United States Court of Appeals

for the Second Circuit

APPENDIX

74-1554

United States Court of Appeals

For the Second Circuit.

B
P/S

UNITED STATES OF AMERICA,

Appellee,

against

MICHAEL PATERNO, GEORGE DENTI and
PATERNO AND SONS, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JOINT APPENDIX.

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ARTHUR KARGER,
Attorney for Defendants-Appellants,
Michael Paterno and Paterno and Sons, Inc.,
600 Madison Avenue,
New York, N. Y. 10022

LOUIS BENDER,
Attorney for Defendant-Appellant,
George Denti,
225 Broadway,
New York, N. Y. 10007

PAUL J. CURRAN,
United States Attorney for the Southern District
of New York, Attorney for Appellee,
United States Courthouse,
Foley Square,
New York, N. Y. 10007

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THE COURT: Do you want him excused?

MR. SILVERMAN: I don't think it is necessary.

THE COURT: No, go ahead.

MR. BRILL: All right.

We expect to prove, your Honor, that in connection with these jobs, and I call them jobs because that's the vernacular, there was required to be excavated a certain amount of material which was required to be hauled away from the job site to a dump site and it was done by truckers, the names of whom we do not and cannot specifically identify with respect to a particular time nor do we think it material, because in the light of the charge made in the indictment, the gravamen of the offenses, the substantive offenses, is that there were deductions that were not properly taken, and therefore, the income of the corporation, which should have been reflected on the corporate tax return was greater and the taxable income thereby was increased. And that by reason of the deductions which the government says now under its present theory that those deductions are limited only to five particular people, we are deprived from being able to show that these jobs could not have been done without the use of a number of trucks, regardless of whose name was on them, regardless of whose name was physically used for the purposes of filing, because of the amount

of material involved that had to be excavated and to be removed.

Without the ability or precluded from being able to establish that, we would be denied the opportunity to interpose the defense to show that we did spend the moneys that were deducted, that the deductions were proper, and that the amount of taxes which we reflected was the appropriate amount of taxes.

And I think, in substance, subject to--

THE COURT: Now, look, in several counts of this indictment-- let me talk to you in terms of Exhibit 173 for identification -- I take it that without stopping over details, it is probably fair to say that these numbers come off the company's books and there is not going to be much fight about them, is that fair?

MR. BRILL: I think that's a fair observation.

THE COURT: All right, you look at fiscal year ending February 1966 and there are various truck and other equipment rental people listed; yes?

MR. BRILL: Yes, sir.

THE COURT: And they total $29,000 in the top batch and $18,000 or $19,000 on the bottom batch.

MR. BRILL: Yes, sir.

THE COURT: And you are saying that you are going

to prove what, that your expenses of hauling away fill and hauling in things and so on, totalled more than the $49,000 shown there?

Is that what you are going to show? And that nobody is going to be able to tell us anything about this number, $12,600, which is far and away the largest single payment to any equipment rental person going to somebody named John Aurrichio, and you say you are not going to have any information about that, but you are going to have total amounts of truckloads through the streets computed by Mr. O'Reilly how long it takes to drive from here to there, and you are going to multiply that out and show you needed to spend that much for excavation?

Is that your position?

MR. BRILL: Not quite.

THE COURT: What is it? I don't understand.

MR. BRILL: The evidence is that we will have an expert who has reviewed the plans, who has traversed the area, who knows what is required to be excavated, and who computes the amount of truck days or truckloads that are required to be excavated, and the amount of fill required to be brought back, which were expended and paid for by the corporation and--

THE COURT: And he will compute that total number?

MR. BRILL: Yes.

THE COURT: On his oath?

MR. BRILL: Yes, sir.

THE COURT: All right. You tell him I am going to allow that. I am going to allow that to go to this jury and I am going to have that sent, then, to a grand jury to be studied.

MR. BRILL: I think that's intimidation.

THE COURT: It is not intimidation.

MR. BRILL: And if I may say so, it is trial by terror.

THE COURT: It is not trial by error either. You are telling me I am precluding you from making a defense which seems to border on fantasies in the circumstances of this case.

But if you represent that people are going to say all these things on their oath, and not tell us anything about John Aurrichio, Michael Catenzaro and the other three, then I am going to allow that, and I want to hear what that sounds like.

Because I have looked at these numbers, and I don't mind telling you that if the defense is going to be it was all spent and nobody knows any of these five people with the enormous sums of money that are shown to

have been paid out to them, I think that needs further scrutiny.

I really do. And I am saying this on the record, and if that is something by terror, knowing how easy it is to terrorize you, I am not upset.

You just go ahead.

MR. BRILL: Well, I am, Judge, I am upset. I am upset and I am completely surprised by it.

THE COURT: Well, surprised or not, are you ready to go ahead with this proof?

MR. BRILL: Sir?

THE COURT: Are you ready to go ahead with this proof?

MR. BRILL: I am ready.

MR. SILVERMAN: Your Honor, may I be heard on this for one moment, please?

THE COURT: Yes.

MR. SILVERMAN: Your Honor, if you will bear with me for just a moment. Even if it is established that there was more dirt that was hauled out at a cost which was greater than the whole cost that is listed on Government's Exhibit 173, your Honor, the government is charging that as far as equipment rental expense that these items are inaccurate, and that these truckers did not

exist. The expense of hauling out this extra dirt may have been charged in a different part of the tax return, your Honor, may have been included as an expense in a different part of the tax return, and not listed as an equipment rental expense.

THE COURT: I am not going to speculate.

MR. BRILL: They don't make any such suggestion in the charge or in the bill of particulars. This is a new theory now being advanced.

THE COURT: I don't care what the new theory is. I am going to allow you to present this proof. I think it goes to the limits of the borders of relevance, and I am going to be interested to hear what it is, but I will allow it.

Get the jury.

MR. BRILL: I want to tell the jury --

MR. SILVERMAN: Your Honor, I have one other question.

Is proof going to be offered as to all five jobs?

THE COURT: I don't know what it is. I can't forecast the proof. I am going to allow this proof if it takes all winter. And then I want to see what it amounts to.

MR. BRILL: I want to respond to the questions that are put by the Court.

I think your Honor knows that I always do, to the best of my ability, whether it is limited or not, depending upon your Honor's view.

THE COURT: I didn't put any question to you.

MR. BRILL: No, but I thought Mr. Silverman asked your Honor to put a question to me.

THE COURT: No, if he did, I am not putting it.

MR. BRILL: All right.

THE COURT: If you want to answer his question, you can go chat about it.

MR. BRILL: I want to say that it has been represented to me by a responsible engineer, a consulting engineer, who has made a study of at least three of these jobs, that the amount of material excavated required more than what is shown under that-- above the line, and that it required the use of a certain number of truck days, which at the rates then relevant for each of those years, came to certain dollars, and that's the proof that I expect to put in, and I am relying upon that reputable expert's statement, his computations and his opinion.

MR. SILVERMAN: Your Honor, it would have no relevance to this case if he does not testify to all five because their contention is on the other two jobs that the correct amount of dirt was hauled away and then these

people are fictitious.

THE COURT: I assume you are going to testify for all five years in this fashion, yes?

MR. BRILL: We are going to have a witness testify to the total expenditures in dollars for all the trucking that was done, yes. The engineer will testify with respect to his computations and it is limited to three jobs but of the time limitations under which he worked.

THE COURT: Limited to three jobs?

MR. BRILL: Three jobs.

THE COURT: How many of these fiscal years is it going to cover?

MR. BRILL: He is going to cover all five fiscal years.

MR. SILVERMAN: Couldn't possibly.

MR. BRILL: He is going to start with Carmel and end with either Johnson or Watson, whichever it is, Judge, and that runs, that covers the whole span of five years.

MR. SILVERMAN: Your Honor, these payments were made for work done at five separate locations and if he does not cover all five locations, he couldn't cover all the expenses.

THE COURT: Well, that's in your favor.

No, I think in eight years of sitting here, I have heard some imaginative defneses. This one seems to me to be among the more imaginative ones.

I don't know how a jury will react to that kind of presentation, but given the understanding that defendants ought to have a latitude to defend themselves, I am going to allow it into the record.

I want you to know now just so we are clear that eventually it is going to be the obligation of all of us to see to it that the theories of this care are presented with crystal clarity to the jury.

I have a request to charge from the defendants which I will deny now which says that if you are confused by the government's proof, then you have a reasonable doubt.

Well, I am prepared to say there is -othing confusing thus far about the government's proof and I think all of us have a duty to see to it that in the end the issues, both the claims and the defenses, are presented with clarity to this jury.

There is no reason they should be confused. There is no reason we should plan on their being confused. And I expect everybody here to see to it by appropriate requests to charge,none of which I have thus far from the defendants,

that these issues are made perfectly clear and intelligible so there will be no confusion.

So you better prepare charges that incorporate this theory and let me look at them.

They should have been done long ago. One of the reasons that requests to charge are called for in advance is so that the judge can be oriented. There was not a scrap of paper among all your various requests, Mr. Brill, that suggested the possibility of this kind of issue in this kind of case going to this jury.

But you prepare it now so that I can make it clear to them when I instruct them next week.

MR. BRILL: Did I not disclose to your Honor some time last week in response to a question put by your Honor as to what we expected to be able to do through expert witnesses?

It is my impression I did.

THE COURT: I believe it was early this week and I began to have an inkling of this at that time, yes. Whenever it was, your reference to expert witnesses, it is not a request to charge, and the full flower and flavor of this theory, I must confess, was by no means clear to me.

But now I am going to let you put all this business in the record and then we will give it to the jury

and see where we are.

Now, let's proceed. Get the jury in.

(Jury present.)

THE COURT: Mr. Brill, I have one other thought on this subject.

I think in order to keep the separate things separate, I am going to have you put this material in as part of your case and not in cross-examination, so that we can keep the separate presentations separate from each other.

I believe that will make for clarity on both sides and I instruct you to stop this line of cross-examination here.

You may recall Mr. O'Reilly as your own witness and put this material in in light of our conversation in your own case if and when we reach that.

Is that agreeable?

MR. BRILL: Well, if that is your Honor's ruling,--

THE COURT: Does it make sense to you, Mr. Brill, in light of our discussion?

MR. BRILL: I thought we could save time.

THE COURT: No, I don't think we could save time by getting the different things mixed up.

All right, whether it makes sense to you or not,

Mr. Brill,let's proceed in that fashion.

MR. BRILL: Will your Honor give me a minute to collect my pages?

I seem to have mislaid them.

THE COURT: Yes.

(Pause.)

BY MR. BRILL:

Q Mr. O'Reilly, you have described the duties or responsibilities of a construction superintendent this morning.

Did that include the hiring of trucks as well?

A Yes.

Q Excavation trucks?

A Yes.

Q To remove excavated material?

A Yes.

Q Were those trucks also used to transfer material from one job to another?

A Occasionally, hear the end of the job, when another job was starting, they moved the excess on one job --

Q I am talking about the peri-d between 1965 and 1970.

A Yes.

MR. BRILL: May I, with your Honor's permission,

have marked for identification these other photographs?

THE COURT: No, I just told you, let's do that in your case.

MR. BRILL: All right, sir.

CROSS-EXAMINATION

BY MR. ROSENTHAL:

Q Now, Mr. O'Reilly, you have been in the construction business about how many years?

A About 25 years.

Q And is it mostly, primarily in the heavy excavation work involving sewers and the like?

A Most of it.

Q And your training has been right on the job, has it not?

A You mean gaining experience?

Q Yes?

A Yes.

Q And is it fair to say that in the 25 years you have come across many truckers?

A Yes.

Q Small and large?

A Yes.

Q And certainly by the time you went up to New Windsor, you had known of many truckers, had you not?

A Have know the truckers or--

Q You had known of many truckers?

A Yes.

Q Now, sir, Government's Exhibit 144 is your New Windsor book, isn't it?

A Well, it is the book that was at the Windsor job.

Q When you got there, and you continued it.

Am I correct, sir, that on--

MR. SILVERMAN: Excuse me, your Honor, I believe we have an unanswered question.

MR. ROSENTHAL: That's true.

Q The book was there when you got there, is that right?

A Yes.

Q Did you continue in it or make any entries in it?

A Yes.

Q And you adopted whatever was in that when you took over the job, is that right?

A You mean, I applied--

Q You made use of the book?

A Yes.

Q Now, am I correct that there are only three

reference in that book that might apply to any trucking or truckers?

A I would have to go through the book.

Q What, sir?

A I would have to go through the book.

Q Well, under the letter "P" you have Provan Trucks?

A Yes.

Q Was that a local concern up in the area of New Windsor?

A Yes, they were in New Windsor.

Q And then under the letter "S" you have Sawmill Trucking.

A Yes.

Q Now, that is a concern down in Westchester, isn't it?

A Yes.

Q That supplies what is commonly called flatbeds?

A Flatbeds and low beds. Low beds--

Q To cut-- I'm sorry --

A The lowbed generally moves equipment.

Q Moving equipment?

A Yes.

Q And then under the letter "T" you have

Teamsters.

Will you look at it, sir?

A Yes, but--

Q And that's the union that covered that area?

A I did not put this in the book.

Q You didn't put it in?

A Right.

Q Did you ever use the number there that's in the book, if you remember?

A No, I don't think so.

pm

Q As you sit there now do you know to whom it refers, as to whether or not it refers to the local business agent of the union, of the Teamsters Union?

A I would have to assume so but I don't know.

Q You don't know.

A No.

Q Good. Then we won't ask you to assume anything.

Now, sir, I show you Government's Exhibit 145 (handing); I believe you told us that was the Riker's Avenue job.

MR. BRILL: Island.

Q Riker's Island job.

A That is where the book was started, on Riker's Island.

Q Right, and someone else also started that.

A They started the notations in it.

Q And Mr. --

A Zindler.

Q He was not employed by Paterno & Sons, was he?

A He was employed by the joint venture.

Q Didn't he actually work for the other joint venturer?

A He was paid from the joint venture, as I was.

Q I appreciate that.

A He represented the other half --

Q Right.

A -- if that is what you are saying.

Q And you have some entries in there and he has some entries in there, is that correct?

A That is right.

Q Now I believe Mr. Silverman went through that book with you with respect to truckers?

A I am sorry?

(Question read.)

A Yes.

Q And under the letter M you have "Minichino" and the notation "trucks", don't you?

A Yes.

Q And then under the letter T you have "Minichino" again, don't you?

Will you look?

(Witness examines.)

Q You have "trucks" and then "Minichino" -- right?

A I have "Taff" and I have "Taff" again.

Q Uh-huh. And don't you also have "trucks"?

A The word "trucks".

Q Uh-huh.

A Yes, "trucks", "Minichino".

Q "Minichino"?

A Yes.

Q And you say Minichino and Taff are one and the same operation, is that right?

A Yes.

Q Then under the letters R -- QR.

A Under the letter R.

Q Yes.

(Witness examines.)

Q I think it is a combination of QR.

A Yes.

Q -- you have a name Rauert

A Yes.

Q Then in parenthesis I think you have "trucks".

A Yes.

Q Then the names "John-Ted".

A Yes.

Q Is that another trucking concern or company?

A Yes.

Q And those are the only two truckers you have listed in that book; is that correct, sir?

A I would have to go all through the book but --

Q Well, would you take my -- all right, I won't ask you to take my word for it. You do have those two

truckers in the book.

A Yes.

MR. ROSENTHAL: And will Mr. Silverman concede that those are the only two truckers named in that book?

MR.SILVERMAN: I won't concede that, your Honor.

THE COURT: Unless you know you won't get a concession on a matter of fact.

MR. ROSENTHAL: I don't know.

THE COURT: If you don't know, my ruling is to ask for a side bar.

The jury will disregard it.

MR. ROSENTHAL: I won't ask for it.

THE COURT: Mr. Silverman cannot make a concession about matters of fact and he cannot testify, unless they stipulate. He is not a witness.

Go ahead.

BY MR. ROSENTHAL:

Q Now there is no question, is there, Mr. O'Reilly, that at the time of the Riker's Island job which was, I think, '69, running through to -- when?

A Into '70.

Q -- into '70 -- that you know of -- maybe not personally but you knew of hundreds of truckers, is that

correct?

A You mean in over my years?

Q Yes.

A I don't know if it is "hundreds". It is many, many.

Q Many, and you have had contact with many -- by "contact" I mean that they worked on jobs that you had worked on?

A Yes.

Q Now if you will look in the back of that diary, the last pages, I guess --

A (After examining) Yes?

Q -- starting with the page that is marked "June" and says "bills payable", and continues throughout that diary, do you have columns of names?

A There are columsn of names here, yes.

Q And to the left of those names are numbers, is that not correct?

A Yes.

Q And am I correct, sir, that those numbers -- I will withdraw that for a moment.

Riker's Island is under the jurisdiction of the Department of Correction of the City of New York, is it not?

A Yes.

Q And there was and is a prison located thereon, is there not?

A Yes.

Q And anybody working on the island, any civilian who is not an employee of the Department of Correction has to have a badge, does he not?

A Yes.

MR. SILVERMAN: Objection, your Honor. Is Mr. Rosenthal testifying? It seems he is testifying how the city functions.

THE COURT: Well, if he knows -- if he says he knows he can tell us.

Do you know that?

THE WITNESS: Yes, I do.

THE COURT: All right.

Q And you had a badge assigned to you, didn't you?

A Yes, I did.

Q And all the other workers that were working for Paterno & Sons, or the joint venture, really, had badgenumbers assigned to them, didn't they?

A Yes, they did.

Q And they kept that throughout the period of their working on the island.

A Yes.

Q And you have listed there, sir, the various workers, their names and their badge numbers, have you not?

A Well, they are listed here -- most of them were put in by Mr. Zindler. He did most of the paper work.

Q But you recognize at least that these were the names of people working.

MR. SILVERMAN: I am going to object at this time. What relevance does it have?

MR. ROSENTHAL: I hope to develop it if you will be patient.

A Yes, I recognize the names.

MR. SILVERMAN: And instead of my statement, I will ask for an offer of proof.

THE COURT: All right.

(At the side bar.)

MR. ROSENTHAL: I intend to establish that there are no trucking or truck drivers listed in that roster because of the fact that the trucks and truck drivers were independent contractors, and they were not kept in the roster of Paterno & Sons as to badge numbers or anything else -- if there were trucks on this job, no question about it.

THE COURT: What good is that to you? I do not

understand what you said is going to be when you get through.

MR. ROSENTHAL: I hope to develop --

THE COURT: All Mr. Silverman is interested in is that in any of these books there are no Aurrichios --

MR. ROSENTHAL. I am sorry, Judge.

THE COURT: I do not understand what the point is.

MR. ROSENTHAL: Well, the point, Judge, is there is no Minichino, there is no Rauert or anything else listed there. They are independent contractors. Their men are not listed, their drivers are not listed, and he would not normally liste any such people.

THE COURT: Do you have to go through this name by name?

MR. ROSENTHAL: No, I do not intend to go through it.

THE COURT: Why don't you ask him, "Isn't it a fact that there are no truckers listed there"?

MR. ROSENTHAL: Well, I intended to.

MR. SILVERMAN: Your Honor, even if he asked that, what relevance is that? None of these truckers are supposed to have worked on those jobs. This is a different job site, your Honor.

mkbr 9 O'Reilly-cross

MR. ROSENTHAL: You brought this book in. I did not bring it in, Mr. Silverman.

THE COURT: You put the book in to show none of the five are there.

MR. SILVERMAN: That is correct.

THE COURT: Is there anything else in there?

MR. SILVERMAN: And there are truckers in the beginning part of it.

MR. ROSENTHAL: There are two truckers listed in the early part, with phone numbers, and that is all that is listed in that book.

THE COURT: And you want to show that there are no truckers listed in the later part?

MR. ROSENTHAL: There are no truckers listed -- I am sorry -- that there are no truckers listed in his list and in Zindler's listing of the badges that were assigned to people, and so forth.

THE COURT: There are two truckers listed in the --

MR.ROSENTHAL: He has Minichino there or Taff Trucking, I think, in four different places.

THE COURT: Yes?

MR. ROSENTHAL: And he has -- I am not sure of the pronunciation -- Rauert, R-a-u-e-r-t -- listed in one

place -- and that's it.

THE COURT: Objection sustained.

MR.ROSENTHAL: I respectfully except.

(In open court.)

BY MR.ROSENTHAL:

Q Now in your years of experience both as a worker and as a superintendent or supervisor in construction, have you ever seen any trucks on the job, dump trucks particularly, without the name of any owner or operator appearing on the side of it?

A Yes.

MR. SILVERMAN: Objection, your Honor.

THE COURT: (To the witness) When the lawyer stands up will you just wait a second, please.

What is the ground of your objection?

MR. SILVERMAN: The government concedes, as it has before, there are people who do not file tax returns and there are trucks that do not have the writing on the side.

THE COURT: It is quicker for him to say "Yes". I will allow it.

BY MR. ROSENTHAL:

Q Mr. O'Reilly, I think you were up in Carmel, New York, were you not?

A Yes.

Q In connection with Paterno's work up there?

A Yes.

Q Was that a sewage treatment plant or something?

A It was a sewage treatment plant.

Q And was there more than one job going on at that time?

A I don't understand the question.

Q All right. You folks were doing what -- when I say "you" I mean Paterno & Sons.

A Sewage treatment plant.

Q And were there any other contractors working right in the immediate area at the same time?

A Yes, there was -- we did the plant and there was two contractors doing the sewer work in the streets that eventually led to the plant.

Q And were they doing it at the same time that you were doing the treatment plant?

A Yes.

Q And do you remember who the other contractors were?

A Yes. One was Balport and the other was either Federico or Frederico.

Q I say, it is either Federico or Frederico?

A Yes.

Q And in respect to equipment was there any working agreement that you know of or were aware of between Balport, Frederico and Paterno & Sons in the use of the equipment?

A With Balport we rented his backhoe when ours broke down. We used his machines, he used our machines.

With Frederico, if it happened it happened only once or twice. We didn't interchange equipment so much with him as we did with Balport.

Q And do you know if that applied to trucks at all -- if you know?

A I don't recall specifically that it applied to trucks but it might have. We would switch a lot of stuff around. Then at the end of the job they just added it up and who was belonged to who I don't know.

MR. SILVERMAN: Your Honor, I ask to strike his answer as not responsive.

THE COURT: Yes, it is stricken. The jury will disregard it.

Q Now Mr. O'Reilly, you were asked about talking with George Denti concerning your being questioned by the Internal Revenue Service and concerning your being questioned by the United States Attorney's office. I think you told us that in your conversation with George Denti you asked

him what it was all about.

A Yes.

Q Up to the time that you received the subpoena or notice to go down to the Internal Revenue Service did you know anything was going on at all?

A No.

Q And when you did get such a subpoena or notice you knew it was in connection with Paterno & Sons, didn't you?

A I knew it was in connection with Paterno & Sons, yes.

Q Right, and you wanted to know what it was about, is that right?

A At that time I didn't.

Q And when you spke with George, try and recall, to the best of your ability, what he told you what he thought it was about.

A I think at the time I first spoke to George he had been been previously called and he had told me it was in reference to tax matters and trucks, to the best of my memory.

Q And did he tell you that he had been questioned concerning certain specific truckers or truckmen?

A Yes.

Q Now did he attempt to tell you that if anybody asked concerning these truckers or truckmen that you should be positive that you remembered them, or anything of that sort?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Sustained.

Q Well, did he tell you, not in these words, but in substance, that the inquiry concerned trucks or truckers that had done work for Paterno and that the government now claimed was non-existent?

A I don't know at that time whether he told me that it just involved trucks or it involved non-existing trucks. He told me it involved trucks and trucks not being there and taxes, something along these lines.

Q And, sir, did George Denti also tell you that whatever was paid by Paterno & Sons for trucks or trucking was for work that had actually been done for Paterno & Sons? When I say that I am not attempting to quote his exact words but I am talking in substance.

A I am almost sure he said to me, "Jimmy, whatever trucks we had the trucks were there and we paid for the trucks".

Q And you, sir, in connection with your work at Paterno & Sons during the years '67 and '68 and '69 did

know, did you not, that trucking was required in connection with their work?

A Of course.

Q And you did know, did you not, that trucking, or particularly in connection with the excavation part was a great deal of the work involved?

A Yes.

Q Are you or not an officer or director of Paterno & Sons, are you?

A No, I am not.

Q And you are not a shareholder -- you don't own any stock in that company, do you, sir?

A No,I don't.

Q You are a man who has been employed by them -- what was it, nine years or ten years?

A Approximately, yes.

Q And you were working for them in '67 and '68 and '69, is that correct?

A Yes.

Q And y ou work right up to this very day for them, is that right, sir?

A Yes.

Q And, Mr. O'Reilly, are you married or single?

A Married.

Q Do you have any family?

A Yes.

Q How many?

A I have six children.

Q And do you live with your wife and family?

A Yes.

MR. SILVERMAN: Objection, your Honor. It is going a little far afield.

THE COURT: Why is that relevant?

MR.ROSENTHAL: It is relevant to show the background of the man.

THE COURT: Why is his background relevant?

MR. ROSENTHAL: Because there have been questions posed to him asking him to refresh his recollection and the like, showing him grand jury minutes, showing him IRS interrogation, and inferences I would say could be drawn by the jury that some of his answers were not as candid as the United States Attorney might have desired them to be, and I think that I should, and have a right to show the background of this witness, and the type of person he is so that the jury may be able to properly weigh and assay his testimony.

MR. SILVERMAN: Your Honor, I do not think that --

THE COURT: I will instruct the jury that the

marital status of a person and the number of children he has are irrelevant to any questions of credibility.

Please proceed.

BY MR. ROSENTHAL:

Q Were you in the service, Mr. Reilly?

THE COURT: Mr. Rosenthal, let us go on.

MR. ROSENTHAL: All right.

Q Have you ever been convicted of any crime?

A No.

MR. ROSENTHAL: I have no other questions.

REDIRECT EXAMINATION

BY MR. SILVERMAN:

Q Mr. O'Reilly, just one short area -- you testified that you worked at the New Windsor job, is that right, sir?

A I am sorry.

(Question read.)

A Yes.

Q And that is in upstate New York?

A Yes.

Q And I believe you testified, sir -- correct me if I am wrong -- that in relation to the New Windsor job all the truckers for that job came from around that area, is that correct?

A The ones that I used, yes.

Q Do you recall any truckers that worked at the New Windsor job that did not come from around that area?

A No, I don't.

Q Okay. And you also worked at the Carmel job, is that correct?

A Yes.

Q And how far is Carmel from New Windsor?

MR. BRILL: I am going to object to this.

A It takes about 45 minutes --

MR. BRILL: Excuse me, please -- unless it is put in a proper time frame. Carmel was in 1965-1966, and Windsor was seven years later.

MR. SILVERMAN: Your Honor, I do not think the location of Windsor or Carmel have changed in the last five years.

THE COURT: Well, if they have you may bring it out on recross.

MR. BRILL: That is not my point.

THE COURT: Whatever your point is I will allow it.

Q How far is Carmel from the New Windsor job site?

A In distance I do not know but I know it takes maybe forty minutes to drive it by car -- 45 minutes.

Q In relation to the Carmel job site did the truckers who worked at the Carmel job site also come from

the area surrounding Carmel?

A I don't think so.

Q Where did they come from, sir?

A There were trucks that were brought up from the city.

Q Where in the city?

A I don't know exactly -- maybe some from the Bronx, some from Queens. I don't know exactly.

Q Did any of them come from Long Island?

A Where?

Q From Long Island.

A They might have, I don't know.

MR.ROSENTHAL: If your Honor please, Mr. Silverman has offered proof here from his own witnesses that they did in fact work at Carmel and they were not from the Carmel area. For him to attempt to mislead this witness I think is reprehensible.

MR. SILVERMAN: Your Honor, I believe the two witnesses that the government put on both came --

THE COURT: Wait a second. I have not heard anything that sounds to me like an attempt to mislead this witness. He has been asking him questions. If you want to make that kind of grave assertion I think you had better come to the side bar to make it.

What is your objection? I am going to hear you now. You have already said, and I have responded to it but the next time ask to come to the side bar.

MR. ROSENTHAL: All right.

THE COURT: And the ground of your objection is what?

MR. ROSENTHAL: The ground for my objection is that there has been evidence adducedbefore this jury, this trial jury that truckers employed by Paterno & Sons at the Carmel job were not from the Carmel area and were from --

THE COURT: Do you agree with that?

MR. SILVERMAN: No, your Honor.

THE COURT: You don't?

MR. SILVERMAN: They were from north of the city, from Westchester County, from Local 456, I believe -- both Mr. La Spina and Mr. Minichino, who were from Local 282 area, both testified that neither of them worked at the Carmel job site, your Honor.

MR. ROSENTHAL: Mr. Capossela -- I am not certain of his name because I get confused -- and they have the name wrong on some documents -- B&C Trucking -- testified that he worked at Carmel and he was not from the Carmel area, so far as I know.

MR. SILVERMAN: Both of these truckers are from the Westchester area. Both of those truckers, your Honor, belong to Local 456, which has the jurisdiction in that area.

THE COURT: Okay. Well, as I understand the scope of the disagreement, I do not have the impression that anybody is being misled, and we will straighten it out when you make final arguments on this subject, if it is necessary; but the objection is overruled.

MR.ROSENTHAL: I respectfully except.

BY MR. SILVERMAN:

Q My question, Mr. O'Reilly, is whether or not any other truckers that worked at the Carmel job site came from Long Island?

A I answered that. I thought they all came from the city -- that's my recollection.

Q Do you recall if any of them came from Long Island?

A I don't know.

Q I would like to show you the August 31, 1971 Q and A of the IRS, and I refer you to page 20, and I ask you to read that page to yourself, sir (handing).

MR. ROSENTHAL: Your Honor, I submit this is not proper redirect.

THE COURT: I will allow it.

(Witness examines.)

Q Mr. Reilly, does that refresh your recollection as to whether or not any of the truckers that were on the Carmel job site worked there, that came from Long Island?

MR. ROSENTHAL: Your Honor, I submit -- I do not know if your Honor has a copy of this Q and A but I submit it would not properly refresh this witness' recollection.

THE COURT: That is for him to say, Mr. Rosenthal.

A As I read that there I don't remember saying what's on that paper.

Q But would this refresh your recollection, sir?

A I don't really know what the question is.

Q The question is, sir, whether or not any truckers from Long Island worked at the Carmel job site, at Carmel, New York?

A My memory of Carmel is that the trucks stayed there and I think we had some local drivers. I don't know if we had some drivers that drove up from the Bronx or not --

Q My question is not as to the Brohx but as to Long Island.

A I don't know.

Q Mr. Riley, did you ever tell Special Agent Ayres that a trucker from Long Island worked at the Carmel

job site?

A I might have, but I don't remember.

Q I am not asking you whether you might have. I am asking whether you did.

A I honestly don't know. I told you that it was my impression that we had trucks from the city. Now whether they came from Long Island, Queens or Bronx I am not sure, but from the city I think we had trucks -- it is a long time ago.

MR. SILVERMAN: At this time, your Honor, I would like to request to be able to read the questions and answers that were given to Mr. Ayres on that date, and the answers to those questions.

MR. BRILL: I am going to object to it, if your Honor please. All he said was that he did not recall, and he has been shown the document. He was asked if it refreshes his recollection from it and he said it honestly doesn't refresh his recollection.

THE COURT: I will sustain the objection.

Q One other thing, Mr. O'Reilly. The fill that you testified was used at the Watson Avenue job, did that fill come from Long Island?

A Yes.

Q And the truckers who brought the fill from Long Island to the Watson Avenue job, were those truckers hired by Paterno or were they trucks of the company who was supplying the fill?

A They were trucks of the company supplying the fill.

Q So the only trucks that worked on the Watson Avenue job for Paterno & Sons were the trucks who were taking the dirt away from the job?

A Most of the trucks that worked on the job were trucks with dirt as you hauled it away from the job. Some of the trucks were maybe used to handle pipe occasionally or move materials occasionally or maybe do some material work but the majority of the trucks were used for excavation, all the excavated material on the job.

I think that is your question.

MR. SILVERMAN: Thank you, sir.

No further questions, your Honor.

THE COURT: Any recross?

MR. BRILL: I have none, your Honor.

jwbr

MR ROSENTHAL: Would your Honor give me a half a moment?

I have no other questions.

THE COURT: All right, Mr. O'Reilly.

(Witness excused.)

W A L T E R N E B E S N Y, called as a witness on behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SILVERMAN:

Q Mr. Nebesny, will you please keep your voice up so that the people in the back will be able to hear you, sir?

What is your full name, sir?

A Walter Nebesny.

Q What is your occupation, sir?

A Civil engineer.

Q By whom are you employed?

A City of New York, Department of Water Resources.

Q How long have you been employed as a civil engineer with the City of New York?

A Over 20 years.

Q And do you have a civil service title, sir?

A Yes.

Q What is that?

A Assistant Civil Engineer.

Q What are the general responsibilities that you perform for the City of New York?

A Supervision and inspection.

Q And supervision and inspection of what type of construction, sir?

A Mostly, mainly plant construction, and sometimes sewer.

Q Mr. Nebesny, are you familiar with the construction of a sewer line on Johnson Avenue in Brooklyn?

A Yes.

Q Is it also an area known as Morgan Avenue?

A Yes. It is Morgan Avenue. Actually the title is Morgan Avenue Interceptor.

Q Were you assigned to the inspection of that particular construction job?

A I was.

Q What was the fill at that location, sir?

A A double barrel sewer and interceptor underneath that.

Q By whom was it being built?

A Paterno & Sons.

Q Approximately when were you assigned to this project, sir?

A If I recall, I think it was in the fall of '67. I'm not sure. I can't recall that.

Q Now, was this project paid for totally by the City of New York, or was it funded by any other source?

MR. BRILL: It is immaterial and irrelevant, your Honor.

THE COURT: Why is that relevant?

MR. SILVERMAN: Your Honor, the government will show certain exhibits were filed because it was funded by other agencies other than the City of New York.

THE COURT: Certain exhibits --

MR. SILVERMAN: The government will offer, will show it had to be filed by the contractor because of the fact there was federal funding involved.

THE COURT: All right, I will allow it.

Q Was there funding from any other source, sir?

A Yes.

Q What was that source?

A There was federal money and state money involved.

Q Were the contractors on this particular job required to file any type of documents with the City of New York?

A Yes, sir.

Q Were they required to file what are known as

certified payrolls?

A Yes, sir.

Q Were they required to file what are known as superintendent's reports?

A Yes.

Q To what departmentof the City of New York were these reports submitted to?

A Department of Water Resources.

Q I show you Government's Exhibit 123 and 128 and 129 for identification and askyou if you can recognize these exhibits?

A Yes.

Q Were these the documents that were filed with the City of New York?

A Yes.

Q In reference to these documents, sir, what particular job site do they refer to?

A Johnson Avenue Interceptor storm sewers.

Q Your particular contractor did it?

A Paterno & Son -- Sons, excuse me. Paterson & Sons.

MR. SILVERMAN: I will offer in evidence at this time 128 and 129.

MR. BRILL: Could we have an offer of proof

with respect to these? I don't quite understand the materiality or relevancy, your Honor.

THE COURT: Why are they relevant?

MR. SILVERMAN: They relate to dates, your Honor, where the government is going to show no work took place.

THE COURT: You are going to claim that?

MR. SILVERMAN: Yes, your Honor.

THE COURT: Okay.

MR. BRILL: I respectfully submit, your Honor, that doesn't come within the issues of the indictment.

THE COURT: Overruled.

(Government's Exhibits 128 and 129 were received in evidence.)

Q Mr. Nebesny, I show you Government's Exhibit 124 and 125 and 143 in evidence and ask you, sir, if you recognize these exhibits.

A Yes.

Q Do you recognize those documents, sir?

A I do.

Q What type of documents are they?

A They are superintendent daily reports.

Q Do they relate to the Johnson Avenue job?

A They do.

Q Do you recall the name or names of the superintendents who worked for Paterno & Sons, Inc. at that particular job?

A Yes.

Q What are the name or names of the superintendents that you recall?

A The name on this particular report James O'Reilly.

Q Do you recall the name of any other superintendent who worked at the Johnson Avenue job?

A Yes.

Q What is his name, sir?

A Tom Cohill.

Q I show you Government's Exhibits 135, 136, 137, 138 and 139 for identifidation and ask you, sir, if you recognize these exhibits.

A Yes.

Q What job did they relate to, sir?

A Johnson Avenue job.

Q What type of documents are they?

A These documents are time and material forms.

Q Do you know when time and material forms are used by a contractor?

A Yes.

Q When are those kinds of documents used?

A When there is a special work order given for unseen conditions.

Q Could you explain that to the jury when that arises, how that would come about?

A Well, a contractor will make a bid on a job and according to the contract documents -- that is, the drawings and also the specifications -- and many times during the course of the work he will find that he starts the job there is something there that is not supposed to be there, and he has a legitiamte claim.

Q In other words, sir, would it be accurate to state then that the contractor performing that contract would have to spend more money than he thought?

A Absolutely.

Q Are these documents filed by the contractor?

A Yes, they are filed by the contractor and they are also vouched by the inspectors.

Q In reference to these particular documents, who signed these particular documents?

A Tom Cohill on the right-hand side and myself on the left-hand side.

Q And when did you sign these documents?

A At the end of the -- at the end of the construction day.

Q That would be the day that is listed on that particular document?

A Yes, sir.

Q Who did you receive those documents from?

A The superintendent in the field.

Q After you received those documents, did you file those documents with the City of New York?

A Yes, they went to our field office, yes.

MR. SILVERMAN: I would like to offer in evidence Government's Exhibits 135 through 139 relating to the same job during the same period.

MR. BRILL: No objection, your Honor.

(Government's Exhibits 135 through 139 were received in evidence.)

Q Mr. Nebesny, did you sign these documents?

A I did.

Q At the time you signed those documents --

THE COURT: What documents are you referring to?

MR. SILVERMAN: The documents received in evidence.

THE COURT: 135 through 139?

MR. SILVERMAN: Yes, your Honor.

Q With reference to these documents, what if anything did you do prior to signing these particular documents?

A Oh, these documents were checked with the conditions in the field.

Q Referring particularly to document, Government Exhibit -- excuse me -- 135, is there a section of the document that is entitled "Description of Work and Location"?

MR. BRILL: It is in evidence, your Honor.

MR. ROSENTHAL: It speaks for itself, Judge.

A Yes.

Q Would you read it?

A Yes , it says here "No work due to severe snow storm Sunday February 9, 1969. Sunday. 15 inch deep with 16 -- with high drifts. Men unable to get to job site."

MR. BRILL: What is that exhibit number?

MR. SILVERMAN: 135.

MR. BRILL: Thank you.

MR. SILVERMAN: At this time the government would like to offer into evidence a stipulation signed by the defendant and the government in relation to the testimony of a Walter Zeltman, if I may read it at this time, your Honor.

THE COURT: Go ahead.

MR. ROSENTHAL: I don't know if I have it, but it is stipulated.

MR. SILVERMAN: "If Walter Zeltman were called as a

witness he would testify he has been a meteorologist for over 30 years with both the United States Army and private corporations.

"2. On February 10, 1969, approximately 20 inches of snow fell in the vicinity of Johnson Avenue, Brooklyn, New York."

Q Now, Mr. Nebesny, in your responsibilities as the city inspector that worked at that particular location, were you required to file any documents with the City of New York?

A Yes, sir.

Q Were these documents called inspector's daily reports and daily narratives?

A Yes.

Q What information is contained on inspector's daily report and narrative?

A Usually the progress of the job.

Q Is there any other information that is contained?

A Occasionally I would also put down the labor reports -- the labor of the day, if it is short.

Q Mr. Nebesny, I would like to show you at this time Government's Exhibits 126, 127, 130, 131, 132, 133, 134, 141 and 140 and ask you if you recognize these exhibits.

A Yes.

Q What are they, sir?

A They are my inspector's daily narrative reports and labor reports.

Q For what particular job site do they refer to, sir?

A Johnson Avenue.

Q Are these documents, these exhibits all in your handwriting?

A Yes, sir.

Q Now, Mr. Nebesny, the last two I showed you, 140 and 141, is a batch of those reports together; is that true?

A Yes.

Q Is it true, sir, that prior to coming into court the last several weeks you examined that group in my office?

A I did.

Q And all those are in your handwriting, sir?

A Yes.

MR. SILVERMAN: At this time, your Honor, the government offers in evidence 126, 127, 130 through 134, 140 and 141.

(Pause.)

THE COURT: Gentlemen, I would like you to look at those for the purpose of seeing whether you have objections to them.

Now, I realize there are a lot of other things you want to see about them, but you may do that at some other time.

Will you just let me know now after this long time whether there is object to them?

MR. BRILL: Your Honor, our objection is based -- and I just conferred with Mr. Rosenthal -- at this time on our inability to check these. It may very well be in the end we will not have an objection and we will consent to it, but at this time we cannot say "No objection."

THE COURT: You mean you haven't had time? Take as much time as you need to tell me if you have an objection. I see a lot of note taking and handwriting and that is not necessary. You go ahead and let me know if you have an objection. I just said don't study them for all kinds of other purposes.

MR. BRILL: No, we have not.

THE COURT: Go ahead. Let me know whether you are ready to say whether you have any objection.

(Pause.)

MR. BRILL: Your Honor, in the interests of saving

time and I think dealing with it judiciously we will reserve whatever objections we have to cross.

THE COURT: You do not save the time. You have taken the time. Now, I want to know if there are any objections to them.

MR. BRILL: Frankly, I haven't gone through all of those.

THE COURT: Please go through them to see if any of them are objectionable and let me know.

MR. BRILL: I can't tell. I would have to check through some other documents which aren't here today.

THE COURT: Come and explain that to me at the side bar.

(At the side bar.)

THE COURT: You don't expect to finish today, I gather? If I stay to 5 will you be finished?

MR. SILVERMAN: I will be done with my questioning of him, your Honor, in about three minutes.

THE COURT: Is he your last witness?

MR. SILVERMAN: One witness, a tax expert, who will testify to computations.

THE COURT: We will stay to 5. Why is it you are not prepared to say you do not have an objection?

MR. BRILL: Because there are attached to these reports what are called labor reports and we wanted to check the payroll sheets which Mr. Silverman has promised to give us and make comparisons. It may very well be that we will have no objection.

THE COURT: Suppose you make the comparisons, what objection might that give rise to? What might you find on those other sheets that would make any objection --

MR. BRILL: It may very well be for cross examination.

THE COURT: Use your imagination.

MR. BRILL: I can't. I am just too tired and exhausted to make any examination. I am sorry, I am not able to do it.

THE COURT: What other payrolls are there?

MR. SILVERMAN: They were handed to us before lunch time.

THE COURT: Go look at them.

MR. BRILL: I prefer not now to because I can't absorb them.

THE COURT: What is your preference?

MR. BRILL: I will not object at this time.

THE COURT: And you, Mr. Rosenthal?

MR. ROSENTHAL: I won't offer any objection at this time, either. I don't know how accurate they may or may not be.

THE COURT: That is not a ground of objection.

MR. ROSENTHAL: That will be for cross examination.

THE COURT: I want to know if there are any objections.

MR. BRILL: That's right.

(In open court.)

(Government's Exhibits 126, 127, 130 to 134, 140 and 141 were received in evidence.)

MR. SILVERMAN: To save the Court's time I will only have Mr. Nebesny refer to only one of these documents.

MR. BRILL: I can't hear Mr. Silverman, your Honor.

MR. SILVERMAN: I will have Mr. Nebesny refer to only one document.

Q Mr. Nebesny, I show you Government's Exhibit 130 and ask you what that is, sir?

MR. BRILL: It is in evidence now.

A An inspector's report.

Q Is that your handwriting, sir?

A It is.

Q What date?

A 2/10/69.

Q Please read to the ladies and gentlemen of the jury the matter that is written on that page.

A There is a project that says, "NCPC Contract 1-A." There is the date which I mentioned, 2/10/69, "Subject: Progress" and the name of the contractor, Paterno & Son. "Johnson Avenue" is the heading. And written on it is "No work due to heavy snowfall, including bulkhead."

Q Mr. Nebesny, did you perform these observations at that site?

A Yes,sir.

Q In the course of your observations as an inspector at this particular site, did you ever during the course of the construction see dump trucks being loaded?

A Oh, yes, I have seen dump trucks loaded, sir.

Q Were those dump trucks loaded by hand or by machine?

A By machine.

Q What type of machine was used to unload the dump trucks?

A At this particular job?

Q Yes, sir.

A Well, he had two types. He had a -- or three different types. He had a payloader, a backhoe, a crane. That is just about it.

Q How many men does it take to operate a crane, sir?

A How many men?

Q Yes, sir.

A You had the operator and if it is a truck crane you had the chauffeur. If it is on treads, you just have an operator.

Q How many men does it take to operate a backhoe, sir?

A Same thing, same men, usually two.

Q And a payloader, sir?

A Usually one.

Q That is in addition to the driver of the truck?

A Well, a payloader wouldn't have -- the payloader operator is the driver.

Q Mr. Nebesny, prior to coming into court today, did youi have an opportunity to examine Government's Exhibits 141 and 142?

A Yes.

Q Did you make that examination in my office, sir.

A I did.

Q And are these records, sir, your reports for the months of October and November of 1968?

A Yes.

Q So that you had an opportunity to examine in my office Government's Exhibits 142 and 143?

A Yes.

Q Are they the superintendent's reports for the months of October and November of 1968 filed by Paterno & Sons, Inc.?

A They are.

Q Included on your reports, sir, is there a listing for how many trucks were used at the particular site on a particular day?

A Yes.

Q In the superintendent's reports is there a listing as to how many trucks were used at a particular site on a particular day?

A Yes.

t6/1 pm

Q Now I show you Government's Exhibit 161 and I ask you if that is in your handwriting, sir (handing).

A It is.

Q And could you explain to the ladies and gentlemen of the jury what these two pieces of paper are?

A These two papers are a summation of the amount of trucks that were used for the montns of October and November in the year '68.

Q And is that the information that you got from examining your reports and the superintendent's reports?

A Right.

Q Now were these two reports prepared at the same time or independently of each other?

A In most times independently of each other.

Q Okay.

Now for the month of October 1968 how many trucks does your report list as having worked at that particular site?

A 81.

Q And how many trucks are listed on the superintendent's reports as working at that particular site?

A 81.

Q Now for the month of November 1968 how many trucks are listed on your reports as having worked at that

particular site?

A 25.

Q And how many trucks are listed on the superintendent's reports of Paterno & Sons, Inc. as having worked at that particular site?

A 25.

MR. SILVERMAN: I have no further questions, your Honor.

At this time I would like to offer in evidence -- excuse me -- Government's Exhibit 161 (handing).

MR. BRILL: Is that what he just read, your Honor?

THE COURT: I take it that is.

Is that what he just gave the figures from?

MR. SILVERMAN: Yes, your Honor.

MR. BRILL: Then I object to it as already in evidence.

THE COURT: Is that the only objection, Mr. Brill?

MR. BRILL: Yes, the only one I can think of.

THE COURT: Okay. You don't have to have another!

(Laughter.)

THE COURT: I just thought maybe there was another

one.

That one I will overrule. It is received.

(Government's Exhibit 161 was received in evidence.)

THE COURT: All right, cross examination, gentlemen.

CROSS EXAMINATION

BY MR. BRILL:

Q When was it, Mr. Nebesny, that you made up this exhibit which is received in evidence, 161?

A 12-19-73 -- December 19, 1973.

Q Just a couple of months ago.

A Yes.

Q And did you do this in consultation with anybody?

A What do you mean by "consultation"? You mean prompting?

Q No, I don't mean "prompting". Did you do it specifically at somebody's request?

A Yes.

Q Is this supposed to be the information that is contained in these other documents that you testified to here today?

A Correct.

Q As well as some other documents that you did not

testify to today?

A No, just these documents (indicating).

THE COURT: You may not be getting heard back there.

MR. BRILL: I am sorry, but I am tired.

THE COURT: I know but Mr. Nebesny sounds even tireder.

THE WITNESS: I am sorry.

THE COURT: Let me ask you both to speak up.

(To jury) Did you all hear that?

Read the last questions and answers.

(Record read.)

Q You refer to Exhibits 131 -- I had better start at the beginning -- 126, 127, 131 to 134 inclusive; 140 and 141, as being your reports; is that correct, sir?

A Correct, sir.

Q And there is another one -- excuse me -- No. 130, which was under the sheet.

A Yes.

Q And you also included Exhibits 142 and 143 which were not prepared by you, isn't that correct?

A That is correct.

Q Now who was it that asked you to prepare this summary, Exhibit 161, of your reports and the reports

prepared by somebody else?

A Mr. Silverman.

Q When was that?

A On 12-19-73.

Q That is the day that you went over to his office.

A Correct.

Q Prior to that time had you been asked with respect to your reports for October and November 1968, which are now in evidence, as Exhibits 140 and 141 -- had you been asked questions about them?

A I had.

Q And were you asked questions about them by Mr. Ayres and Mr. Rizzo of the Internal Revenue Service?

A Yes.

Q And at that time did you have your own reports which began with -- what, 126 and running to 134, something like that?

A Yes.

Q Had you made a comparison of your reports with the reports made by the job superintendent?

A No.

Q Never done that before.

A No.

Q And you told that to Mr. Rizzo and Mr. Ayres?

A No, I didn't tell them that.

Q You didn't tell them that?

A No.

MR. BRILL: Could I have the original of 3524?

(Mr. Silverman hands.)

BY MR. BRILL:

Q I show you this document, Mr. Nebesny, and ask you to tell us whether it bears your signature (handing).

A (After examining) Yes, it does.

Q Did you swear to that on February 26, 1973 before Mr. Ayres and Mr. Rizzo?

A I did.

Q Did you initial the first page?

A I did.

Q And did you initial what appears to be the third page?

A I did.

Q Both at the top and at the bottom?

A Yes.

Q Did you say at the bottom of the third page -- I will withdraw that.

Did you list on page 3 for the months of October and November what you claimed your daily reports

indicated with respect to the number of trucks?

A I can't recall it. I may have.

Q Okay.

Will you look at this, please, and tell us if you did that (handing)?

A (After examining) No, I can't say this is my handwriting.

Q Did you read that before you signed it?

A Yes.

Q And does it purport to reflect the number of trucks that you referred to in Exhibits 140 and 141?

A Supposed to.

Q And did you say under oath at that time that the trucks listed on those dates in the months of October and November were observed by you but you made no comparison -- no comparison was made by you with the superintendent of Paterno & Sons?

A I don't think it is stated on there as such.

Q Well, does it say so on the bottom of page 3, of 3524?

(Witness examines.)

MR. SILVERMAN: Objection, your Honor, to what it says on there.

A That is right, no comparison was made --

THE COURT: I do not see that that is inconsistent. He told you that he made no comparison.

Why are you eliciting this?

MR. BRILL: I do not understand that he said it.

THE COURT: Yes.

MR. BRILL: I thought he said the contrary. I may be mistaken but that is what I thought.

THE COURT: What did you say?

THE WITNESS: I made no comparison.

THE COURT: I think he said that.

MR. BRILL: All right.

THE COURT: Leave it to the jury's recollection.

MR. BRILL: I am only human. I make some mistakes, your Honor.

THE COURT: That is a great concession!

(Laughter.)

MR. BRILL: I make it every time I make a mistake.

Q Actually were you talking about the list of trucks or the list of truck drivers at the time that you made this document, Exhibit -- this document to which you swore on February 26, 1972?

A (After examining) I can't recall. I will have to look at my labor reports.

Q Please do, Exhibits 140 and 141.

A (After examining) In the reports it is listed as truck drivers.

Q Not as trucks?

A Not as trucks.

Q And that is true of both, in Exhibits 140 and 141, isn't that so?

A (After examining) True.

Q I beg your pardon?

A True.

Q You are not given to putting your name down carelessly, are you --

A No.

Q -- Mr. Nebesny?

A I hope not.

Q And you are pretty careful about the things you check and how you report them?

A Usually.

Q At least you were mistaken about that particular thing, weren't you?

A Mistaken?

Q I am referring to Exhibit 161, which I think it is the number of trucks that you testified to in November and October 1968 (handing).

MR. SILVERMAN: I am going to object to that.

There is no difference between --

THE COURT: That you can bring out on redirect. It raises a question whether there were more trucks than drivers or less trucks than drivers, and I guess that is assumed in Mr. Brill's question, and the witness may answer.

A I can't say exactly I was mistaken. In one respect we are talking about trucks, and in another respect we are talking about truck drivers.

Q All right.

Now you said in Exhibit 131, which I now hand you, that there was snow removal to maintain emergency traffic on Johnson Avenue, and that was under date of February 11, 1969; right?

A (After examining) Right.

Q Did you indicate anywhere the number of trucks used to remove that approximately 20 inches of snow that lay on that site on that date?

A No.

Q Is there any other report that you made that shows the number of trucks that were used to remove the snow on that site on that particular date?

A There doesn't appear to be any.

Q Well, did you make any other report?

A I can't recall that.

Q All right.

A I may have but I don't recall.

Q But you don't recall any others.

A No.

Q Would it be fair to say that you did not make any other report with respect to that?

A No, it wouldn't be fair.

Q Have you, before you came here today, had several conferences with the prosecutor and others connected with the prosecution staff?

A Two, to be exact.

Q And on those occasions did you go over all the reports that you had with respect to this Johnson Avenue job?

A Yes, sir.

Q By the way, how long in distance, linear distance is that Johnson Avenue sewer job?

A On one section it is 550 feet. Then if you turn around, maybe an addition 200 feet on Morgan Avenue.

Q On Johnson Avenue.

A On Johnson Avenue it is 550 feet.

Q And beyond that where else did it run?

A Well, it turned around, I think it went north, if I remember correctly.

Q And how many feet did it go there?

A Approximately 200.

Q And the total would be 700 feet?

A Yes, sir -- lineal feet.

Q Lineal feet.

A Yes.

Q Now on November 13, according to Exhibit 133, you reported that there was snow removal and miscellaneous work; right (handing)?

A (After examining) True.

Q Did you make any indication at all as to the number of trucks that were used in connection with that snow removal?

A No.

Q You did not supply any of those trucks, did you?

A No.

Q Did the City of New York supply any of those trucks?

A They may have -- I don't know, I don't recall.

Q Isn't it true that those trucks were procured by and supplied by Paterno & Sons?

A I don't know -- by the City of New York?

Q No, Paterno & Sons, Inc.

A I don't know. I don't recall any names of the

trucks. I don't recall the trucks, honestly.

Q Didn't the contractor provide the trucks for the removal of the snow?

A I don't recall.

Q How was the snow removed -- by hand, buckets, shovels or how?

A Payload.

Q Payload?

A Usually payload.

Q And was it loaded into trucks?

A With the payloader, yes.

Q Yes. Now how many trucks --

A Oh, wait a minute.

Q Yes?

A It's possible that it has been removed by trucks, and it's also possible that it may have been piled somewheres on the site.

Q You don't really know?

A No, I do not. I just said "snow removal."

Q And you gave no indication on your report with respect to that subject matter on that day, isn't that correct?

A That is correct.

Q And you do not know of any other report that

relates to that aspect of the work done on the Johnson-Morgan Avenue sewer interceptor project on either of those two dates; right?

A Offhand I don't recall.

Q Well, as a result of the conferences that you held as late as -- whatever the last date was -- did you check your files to see if there were any other reports?

A No, I didn't check the files.

Q Were you asked to produce all the reports that you made with respect to the periods that you have testified about here?

A Well, I was asked previously -- prior to the consultations.

Q And did you furnish any other reports beyond those that have been introduced in evidence?

A Well, the reports were there to be submitted.

Q Were there any others, in addition to those which have been received in evidence? That is all I am asking.

A You mean referring to these two days.

Q Any day?

A Oh, yes, there is quite a few reports. There's the whole job.

Q With respect to February 1969?

A Well, that is something else again.

(After examining) February 9th?

Q February 1969 -- not the 9th?

A No. I think they are all here.

Q All right.

Now I show you Government's Exhibit 134, in which you talk about miscellaneous work and snow removal and digging out of equipment.

Did you show the number of trucks involved in the removal of whatever was done there that day?

A No, no trucks.

Q No indication of the number of trucks?

A No,but that doesn't necessarily mean that trucks weren't employed.

Q Can you tell the jury how that snow was removed?

A The snow removal could be by hand.

Q By hand?

A Yes.

Q And is that your testimony now, that that may have been by hand?

A I said "could be".

Q I am asking you.

A I don't recall.

Q You have no recollection?

A No recollection, no.

Q All right. And on January 10th, according to No. 130, you indicated that there was no work done due to heavy snowfall, including bulkhead, is that right?

A Yes.

MR. SILVERMAN: Did you say January 10th?

MR. BRILL: No, I beg your pardon -- thank you for calling it to my attention.

February 10th -- right?

A Right.

Q By the way, do you know who brought the tile to the Johnson Avenue job about which you made a report dated April 4, 1968?

A No, I don't remember who brought the tile.

Q Exhibit 127. Do you know whose truck brought it in?

A No.

Q You have no idea about that; all right.

Can you tell me what that word is, Mr. Nebesny?

A Solder.

Q Solder?

A Yes.

Q Solder beam?

A Right.

Q That is a particular piece of material?

A Structural steel.

Q Structural steel?

A Yes.

Q Is it a large piece of material?

A Well, the terminology there means that it is standing upright.

Q How high does it stand upright?

A Oh, it could be quite a distance.

Q Like what? 20 feet?

A Oh, it could be as much as 40, 50, 60 feet.

Q And on the Johnson Avenue job how tall did these solder beams stand?

A On one side -- oh, I don't recall offhand what the elevation was. I know they were four feet below the usual penetrationor the sub-surface materials. They were four feet below that.

Q Below what?

A Four feet below the subgrade of the material.

Q What was the subgrade of the material?

A Oh, I don't remember that.

Q. Couldn't they be as much as 20 or 30 foot beams?

A Oh, yes.

Q. Do you know how they arrived at the job site?

A They were delivered.

Q By what?

A Usually by a trailer truck.

Q Did you actually see them delivered?

A Yes.

Q Did you make any notation on Exhibit -- any one of these exhibits as to the receipt of that material?

A No, that is not the contractor's truck.

Q That is not the contractor's truck?

A As far as I know, no. That is a supplier's truck.

Q Did you indicate that any place?

A I usually don't.

Q You only indicate on your reports those jobs which are performed by the contractor himself in accordance with the terms of the contract; is that correct?

A Yes.

Q By the way, is the contract awarded on competitive bids?

A Yes.

Q And this particular one was to your knowledge?

A Yes, sir.

Q And you were fully familiar with the specifications and the plan?

A More or less.

Q As an engineer and the inspector on the job wasn't that part of your duty?

A Yes, but it is a big problem. I don't profess to know every bit of it.

Q All right, that's very candid.

Were there other inspectors on the job besides you?

A No. Others when I was on vacation.

Q Only when you were on vacation?

A Right.

Q How long did the job take, approximately?

A Maybe a year and a half, 18 months I think was the total requirement at that time. I think it was 18 months.

Q And during that time how long were you absent from the job site by reason of your vacation or other reasons?

A Two months.

Q Two months?

A Two months, plus some sick days also.

Q All right. Now, during the balance of that period you were the only inspector on the job; right?

A Correct.

Q And you were familiar with all of the details of the job?

A Like I said before, more or less.

Q And you ensured that the contractor carried out his obligations under the contract in accordance with the plans and specifications, right?

A Right.

Q All right.

As a matter of fact, there came a time, did there not, when -- were you called the resident engineer on the job?

A No, sir.

Q Was there a resident engineer on the job?

A Yes.

Q Who was that?

A Mr. Pete Geiss.

Q And was he your superior on the job?

A He was.

Q And you reported to him and conferred with him from time to time?

A Yes.

MR. BRILL: Would you mark that for identification, please.

(Defendants' Exhibit AV marked for identification.)

THE COURT: Mr. Brill, I don't imagine you are going to finish in the next five minutes or so?

MR. BRILL: Your Honor is absolutely correct.

THE COURT: All right. In that event, it being Friday, we are not going to complete the government's case this afternoon, I think we ought to stop.

Is that agreeable with you, Mr. Brill?

MR. BRILL: Agreeable with me, your Honor.

THE COURT: Monday is a holiday, so let's plan to be back on Tuesday at 10 a.m.

Have a good long weekend. Good afternoon.

(Jury left the courtroom.)

THE COURT: You are excused until Tuesday, Mr. Nebesny.

(Witness temporarily excused.)

THE COURT: Let me keep you a minute, gentlemen. I think before we suspend for the weekend, I am going to deliver a small reprimand for myself.

While you were all looking at exhibits before, I was looking at the indictment and thinking about this slightly passionate discussion of the proposed defense as Mr. Brill has explained it to me today.

I guess I ought to say the following things:

I have listened with care to the evidence and I have been thinking about it obviously in light of the indictment. Without going any further, as I look at the last four counts in which each of the defendants is charged with signing a false tax report, I measure that against my appreciation of the evidence, the large number of specific invoices for specific dates made out to specific people, the very substantial amounts involved in each year for Messrs. Arrichio, Catenzaro, et cetera, for their respective years. I think in every year those names, or some of them, get higher total amounts of the

expense money than any other equipment rental person.

When I think of that and think of the knowledge of this parade of witnesses, all of whom were able to remember specific truckers of much lesser importance in terms of quantity and money, I guess I am led in my apprehension of this record to feel that anybody considering the facts sooner or later -- and I guess I am thinking of the jury -- will demand some information about these names.

As a practical matter, it seems to me when you compare the amounts involved with the amounts of allegedly over-reported expenses that is an inevitable need in the mind of anybody who has paid attention to this evidence. I guess in light of that apprehension of the record, it has been my feeling that to fail to supply some such explanation as to these individuals as a practical matter -- I am not talking about who has the burden of proof or anything of that kind -- must inevitably make a trier of the facts, even a lay juror, feel that general information about truck loads and quantities and expenses is beside the point.

I guess in trying to anticipate what this defense adds up to, I was, in effect, moving toward that view. But I believe now that all this kind of ef-

fort, if it is made as a defense, without any explanation of who Aurrichio, et cetera, were, although that may seem fantasitc to me -- and it does -- it invades the province of the jury for me to be moved by that tentative reaction. I think it is my duty either to allow their evidence to be offered, or not to allow it.

And I think I was led by my appreciation of it as bizarre to make the rather heated observations I made earlier. I don't think I am entitled to make those heated observations. I think I must either admit the evidence, however absurd it seems to me, or exclude it.

And having decided that I am sufficiently uncertain to admit it, I think it is my duty to admit it without more, so any comments I made about it, any tentative views I have about it I hereby withdraw.

You may put it on; I leave it to the jury.

It seems to me to be so close to be utterly irrelevant that if the government wants to spend the time, I will read a memorandum early Tuesday morning on that subject. But as of now, groping my way through this, if that is what the defendants really mean to put in as their explanation of this situation, I think I have to leave that to the jury and I will. And that is where we stand on that.

I think it also has helped me to realize that it is not useful to have this put in in dribs and drabs of some so-called cross examination of friendly government witnesses and it is a good idea to leave this all to the defendants' case when they come on to put on their defense.

And that, whether it is legally correct or not, has helped me a little bit to get organized on this subject in my own head.

So that is where you stand on that subject. And I as of now will overrule -- I adhere to the overruling of the government's objections, though I do it without considerable doubt.

Do you follow that, Mr. Silverman? If you want to write about this or make some kind of a presentation you may. My own judgment is it is not worth it and that it would take me longer than it is worth to lay out this subject in an opinion and figure out the relevance or irrelevance of this demonstration. I think we will leave it to the jury and let them judge on this whole record whether all of that adds up to anything that ought to be deemed to create a reasonable doubt.

I reaffirm that it will be important, and I expect the defendants to submit requests to charge that are suitable -- it will be important to make clear that

there is no ground for confusion no matter how many specifications and plans and photographs go into this record, and to make clear what the narrow contention of the defendants is on this subject factually as well as legally and I will give that to the jury.

Did you want to be heard?

MR. SILVERMAN: Your Honor, it seems like the Court has already made up its mind as to the admissibility of the evidence.

THE COURT: You never worked with me before. I try, although I sometimes fail, to be candid with counsel. I am not asking you to spend the weekend writing as an exercise. I am asking you to do it because I am in doubt. As of now the situation is as I have outlined it.

I am sufficiently doubtful about this kind of evidence that I suggest if you think it is worth the investment I will read with care any presentation you make as to why it should be excluded. But having the doubt as to its relevance, having no doubt whatsoever about what this evidence would mean to me, but having the doubt as to whether it ought to go to the jury, I am where I am.

MR. SILVERMAN: Your Honor, if I just may delay

the Court for one minute --

THE COURT: Sure.

MR. SILVERMAN: The only problem that I foresee besides totally confusing the issues in the case is that if this expert testifies that at a particular job site or job sites a certain number of trucks were needed to haul the dirt away and bring the dirt back to the job site, he forms a conclusion as to that, is that expert going to be able to examine the books and records of the corporation and be able to tell how much the corporation actually spent of those expenses? If I cannot do this then, your Honor, all the jury is left with is the number of truck loads and the number of sites and it in no way relates to this particular case as to how much was spent by the corporation for those particular expenses.

And I don't believe an expert can look into those books and records and be able to tell from his own personal knowledge as to how much was paid for those expenses.

THE COURT: There are lots of defenses that don't work out. If that is all it adds up to and the jury looks at that, I don't know why that shouldn't be a matter of argument. It doesn't seem to me to take long to say just what you said and to argue, if that is your position,

that without some information about Aurrichio and Catenzaro, et cetera, this doesn't amount to anything. That happens in many cases. And it seems to me that is where it will be at in the end, but I can't rule that way because the jury is entitled to look at it if it amounts to the beginnings of a technically arguably relevant defense.

It seems to me that is what it amounts to technically. However, I think what Mr. Silverman suggests makes sense.

Mr. Brill, I want you to give me on Tuesday morning at 9:30 a.m. a request to charge which incorporates all the facts that you think you are going to show in this regard and shows why you should be allowed to put it to the jury because if you are not going to show that more trucks were used than the company's own records seem to indicate, or if you are not going to show that the expert has a basis for knowing that more money was spent for trucks in some way than the figures would suggest, then maybe this thing will collapse.

So give me that written out so I can look at it. It may help me to clarify my thoughts. I imagine I will still come out where I am, but I want to know your position in that regard exactly.

And all of this is assuming that -- because that is

what you told me -- that we are not going to hear specifically that Aurrichio was really somebody names Ginsberg or something or other about who these various people are or when they got paid and so on. I am assuming that based on your presentation. If that assumption is wrong you can correct it in your request as you give it to me.

MR. BRILL: I think that is a fair assumption. Both Mr. Silverman said so in his opening and it has come through in the evidence that we have made an effort to find out who these people are. And that occurred when the issue was first raised by the Internal Revenue agents. Mr. Rizzo, your Honor will recall, testified in a conversation --

THE COURT: Don't go into all that because that you can argue go the jury. If you want to argue that there were five truckers in these years who got all this money, none of whom can be found by private detectives you go ahead and argue it.

See you Tuesday.

MR. ROSENTHAL: Judge, there were certain things introduced into evidence that we were not furnished with copies of and which are necessary in respect to the cross examination of Mr. Nebesny.

THE COURT: Mr. Silverman, can you accommodate your friends with that?

MR. SILVERMAN: Yes, your Honor.

THE COURT: All right.

See you Tuesday.

MR. BRILL: Thank you, sir.

(Whereupon, an adjournment was taken to Tuesday, February 19, 1974, at 10:00 a.m.)

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United States of America
v. 73 Cr. 410
Michael Paterno, George Denti
and Paterno & Sons, Inc.

New York, February 19, 1974
9:30 a.m.

- - -

(Trial resumed.)

- - -

(In open court; jury not present.)

MR. SILVERMAN: Does your Honor want us to be heard on the matters you requested?

THE COURT: No, not right now; they can wait.

(Jury present.)

THE COURT: Good morning.

THE JURORS: Good morning.

W A L T E R N E B E S N Y, resumed.

THE COURT: All right, let us proceed.

CROSS EXAMINATION CONTINUED

BY MR. BRILL:

Q Good morning, Mr. Nebesny.

A Good morning.

Q Did you talk with anyone about the testimony in this case since you left the courtroom last Friday?

A Not anyone in this courtroom.

Q I don't mean in the courtroom but have you talked

to anyone about your testimony since you left the courtroom?

A Not really. I talked to the immediate family, that's all.

Q The immediate family.

A Yes, they wanted to know what I was doing.

MR. BRILL: Will your Honor indulge me for just a minute. I have lost the page.

Q On Friday, in your direct examination, Mr. Nebesny, at page 1320 you were asked the question --

MR. BRILL: Line 15, your Honor.

Q -- "Q In the course of your observations as an inspector at this particular site, did you ever during the course of the construction see dump trucks being loaded?

"A Oh, yes, I have seen dump trucks loaded, sir.

"Q Were those dump trucks loaded by hand or by machine?

"A By machine."

Q Now with respect to the dump trucks that you saw loaded by machine can you tell us, Mr. Nebesny, whether you observed the names -- first, if you observed any names on any of the dump trucks.

Q Did you make any record in any of your reports of any names on any dump trucks?

A No.

Q Did you in connection with your familiarity of the work done at the Johnson Avenue project come to learn the volume of material excavated from that project?

A No, I never took that into account.

Q Is it fair to say, Mr. Nebesny, that was a brief job crowded into a confined area?

(Mr. Silverman stands.)

THE COURT: Mr. Brill, is this related to the subject that I said could be permitted to be made part of your case?

MR. BRILL: Only tangentially, your Honor.

THE COURT: Well, it is excluded tangentially. Now proceed in accordance with my definition of how we were to proceed.

MR. BRILL: I will, your Honor.

BY MR. BRILL:

Q To your knowledge, Mr. Nebesny, did Paterno & Sons meet all the specifications and requirements of the contract?

A Yes.

Q And to your knowledge was that job satisfactorily completed?

A Yes.

Q In all respects.

A Yes.

Q And did there come a time when there was submitted the original of Exhibit AV for identification (handing)?

A (After examining) Yes.

Q And having looked at AV would you say that it is a copy of the original that was signed by Geiss, I think you said was his name?

A No.

Q The resident engineer?

A I signed it.

Q You signed it?

A Yes, because Mr. Geiss was deceased at the time.

Q And you actually signed the exhibit of AV?

A Yes.

MR. BRILL: I offer AV in evidence, your Honor.

MR. SILVERMAN: Your Honor, I object on two grounds, the first ground being wholly irrelevant to the matter before the court; the second ground being that this is not the best evidence.

If the Court ruled that my first ground is overruled, then I would withdraw the second ground, your Honor.

THE COURT: Why is it relevant, Mr. Brill?

MR. BRILL: Well, it is relevant to show what that job involved, what were the items that were obliged to be performed; that it was completed within the contract

period with days to spare, and at a figure less than the bid.

THE COURT: It's excluded.

MR. BRILL: I respectfully except.

May I inquire with respect to the subject matters concerning which I have just suggested that this document is relevant?

THE COURT: No, you just indicated to me why you thought it was relevant. None of the things you said seem to me to be relevant, and therefore I do not think they are proper subjects of inquiry.

Now go ahead and let us more or less stay within the scope of the direct examination of the witness in any event.

MR. BRILL: I respectfull except, and I have no further questions.

THE COURT: Mr. Rosenthal.

CROSS EXAMINATION

BY MR. ROSENTHAL:

Q Mr. Nebesny, through your years of experience you are familiar with the heavy construction business, are you not?

A More or less.

Q And you do know, do you not, sir, that the average

contractor does not own all of the equipment that he might use on a job?

A True.

Q And he rents that equipment --

A True.

Q -- from companies or individuals?

A True.

Q Is that true, sir?

A That's true.

Q That's true of cranes, true of backhoes, payloaders and trucks, is it not?

A True.

Q And many times when the rental is made it is made with an operator.

A Correct.

Q And the operator would be the employee of the owner of the equipment, would he not?

A Correct.

MR. ROSENTHAL: I have no other questions.

THE COURT: Any redirect?

MR.SILVERMAN: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. SILVERMAN:

Q Mr. Nebesny, on the reports that you filed with the City of New York, do they list the names of the types of equipment that are there, the names of the companies who supplied the types of equipment, or the amounts or quantities of the equipment?

MR. BRILL: The reports which are in evidence speak for themselves, your Honor.

THE COURT: Are they in evidence?

MR. SILVERMAN: Yes, your Honor.

THE COURT: Sustained.

MR. SILVERMAN: One other thing from Friday that was hanging over my mind.

Q Mr. Brill asked you a question on the two listings you prepared. One listing enumerated truck drivers and the other was enumerated with the title "trucks."

Did you ever see a truck come to the City without a truck driver?

A No.

Q Did you ever see a truck driver come to the City without his truck?

A Not relating to the work. Maybe he would come looking for a job. If it's relating to the progress of the

work he would come with his truck.

MR. SILVERMAN: I have no further questions.

THE COURT: Anything else?

MR. BRILL: No, your Honor.

MR. ROSENTHAL: No, your Honor.

THE COURT: Mr. Nebesny, thank you.

(Witness excused)

MR. SILVERMAN: At this time I would like to offer into evidence certain records.

Perhaps we can do it afterwards.

S I D N E Y B U C H B I N D E R, called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SILVERMAN:

Q Where are you presently employed?

A At the regional counsel's office of the Internal Revenue Service.

Q What is your position, sir?

A I am technical adviser to the regional counsel.

Q What is your educational background?

A I have a bachelor's degree from City College of

New York, a master's degree from New York University.

Q What field is your master's degree in, sir?

A In both instances my major was accounting.

Q How long have you been employed by the Internal Revenue Service?

A About 24 years.

Q Mr. Buchbinder, whatis the function and responsibilities of the technical adviser to the regional counsel?

A Generally to review cases recommended for criminal prosecution purposes.

Q Was that the computation of the tax liabilities?

A Yes, sir.

Q In the course of your responsibilities, sir, did you receive a report from a special agent Walter Ayres concerning an investigation of a corporate taxpayer by the name of Paterno Sons, Inc.?

A Yes.

Q Did that report relate to the fiscal years ending 2/67 to 2/70, four fiscal years?

A That is correct.

Q Based on the figures that you received from Special Agent Ayres, did you prepare a computation of the

tax liabilities of the defendant corporation, Paterno & Sons, Inc. for those fiscal years?

A Yes, I did.

MR. BRILL: I will object to this entire line. There is nothing to show that Mr. Ayres prepared any figures in connection with this.

THE COURT: The witness has testified that he received some, so there is that much to show it. I don't understand the ground of your objection.

MR. BRILL: The ground is that apparently Mr. Ayres did not make any examination on the basis of which he could prepare any figures and submit them in a report.

THE COURT: You are talking about facts which are not within your knowledge. The witness is testifying about them.

The objection, as you put it, is overruled.

Proceed.

MR. BRILL: I respectfully except.

Q In front of us is Government's Exhibit 165 for identification. Do you recognize it?

A Yes.

Q What is it?

A This is the computation of a taxable income

and tax liability for those fiscal years that you mentioned.

THE COURT: Mr. Brill, just to be clear that I know what you are talking about, the returns for the corporation are in evidence before us, are they not?

MR. BRILL: True, sir.

THE COURT: And the alleged figures relating to trucker expense, specifically the figures of the five names that are centrally involved in this case, are also in evidence and, as I understand it, taken from the books of Paterno & Sons, Incorporated.

MR. BRILL: Yes, sir.

THE COURT: Mr. Silverman, do I understand that Mr. Buchbinder is going to offer to this jury a computation of what the tax liability would be if those expenses attributable to those five names were deleted from the returns? Is that a fair statement?

MR. SILVERMAN: Tha's correct, your Honor.

THE COURT: Mr. Brill, do you have an objection to Mr. Buchbinder's doing that?

MR. BRILL: I do, your Honor, because he is not really making a computation. All he's doing is taking some figures contained in Mr. Ayres' report which presumptively already contains these figures.

THE COURT: But the computation he's going to

make is a tax computation.

Is that what you are going to give us?

THE WITNESS: That's right.

THE COURT: You may cross-examine about it.

Let me understand why you object to his giving the jury a computaion based on figures that are in evidence and on the tax schedules that are matters of which the Court could in any event take judicial notice.

MR. BRILL: He has not said he has examined the figures that are in evidence. He has testified, as I heard his testimony, that he took a report made by Mr. Ayres and on the basis of that report made computations.

Whether or not that report conforms with what is in evidence I do not know.

THE COURT: Would it not be possible for you both to stipulate to the figures that Mr. Buchbinder is going to give us in any event since they're just matters of arithmetic?

MR. BRILL: I think it's possible.

THE COURT: Therefore, is it something that we ought to use up time about, do you think?

MR. BRILL: No. I'm in favor of saving time.

THE COURT: Let the witness testify and if

the figures that result seem to you to warrant debate of any kind, either in the form of cross-examination of tis witness or in the form of your presentation of counterveiling figures, I'll give you full opportunity to do that.

Go ahead.

MR. BRILL: I think I misunderstood. I thought your Honor asked if we could stipulate in lieu of--

THE COURT: I don't want you to waste time stipulating. If he gives you what you could stipulate to in any event it's quicker so let me hear it because I suspect, Mr. Brill, that it's not going to be the subje ct of any controversy in the nature of what we have already got in the record.

Let's hear it and see where we come out.

MR. SILVERMAN: At this time I would like to offer into evidence Government's Exhibit 165, which are the computations of Mr. Buchbinder.

THE COURT: Show it to counsel, please.

(Pause)

MR. BRILL: Would your Honor prefer that I leave the few questions I have for cross?

THE COURT: Do you have any objection to that exhibit?

MR. BRILL: That's what my question would be addressed to.

THE COURT: Do you want a voir dire?

MR. BRILL: Yes.

THE COURT: You may have it.

VOIR DIRE EXAMINATION

BY MR. BRILL:

Q The figures that appear on Exhibit 165 for identification with respect to the column to the right both at the upper lefthand portion and the lower portion, are they your own computations?

A Yes.

Q They were not submitted to you?

A No, sir. I computed them myself.

Q You actually did the arithmetic?

A Yes.

Q You did it on the basis of the figures that were submitted to you?

A On the basis of this figure -- actually, the figures are --

Q There is a difference between the first and second columns?

A Yes.

Q All you did was to mirror that?

A Yes.

Q Had that been done before it came to you?

A No, sir. I did this.

Q Youdid it for the first time?

A Yes.

MR. BRILL: I have no further questions, your Honor.

THE COURT: Are there any objections to the exhibit?

MR. BRILL: Not as to the arithmetic computation.

THE COURT: Are there any objections to the exhibit? If so, what are they?

MR. BRILL: The objections are those that I stated earlier, your Honor, that they're based upon figures which he did not prepare or examine.

THE COURT: Are those figures you base these computations on the figures from the Paterno & Sons tax returns?

THE WITNESS: Basically on the figures as submitted by the special agent.

THE COURT: What were those from?

A If I am not mistaken they were based on the books and records of Paterno & Sons.

THE COURT: Are those figures other than what you would stipulate to, Mr. Brill? You have checked them over obviously before we came to court because you had alleged figures before you, isn't that right?

MR. BRILL: Yes, sir.

THE COURT: Are those figures different from what you would be prepared to stipulate to accepting the premises on which they are purportedly based? They're really the same?

MR. BRILL: I think so.

THE COURT: Why should we spend time debating on how to get them before the jury since we could give the jury a recess and stipulate to them?

MR. BRILL: We could, your Honor.

My objection is to the manner in which it is done. I don't think that's proper.

THE COURT: But the ultimate result of the manner is that these figures which are computations of alternative tax liabilities under certain conditions are figures that could properly be placed before the jury, isn't that correct?

MR. BRILL: Would your Honor be good enough to restate that?

THE COURT: These figures compute alternative

tax liabilities, and if the expense amounts which the government claims were fictitious were concluded from the deductions taken for Paterno & Sons, Inc., these would be the resulting recomputed tax liabilities; isn't that correct?

MR. BRILL: On that basis, yes, sir.

THE COURT: On that basis we'll allow the exhibit to be received in evidence.

(Government's Exhibit 165 was received in evidence)

3/1 am

MR. ROSENTHAL: Will your Honor make it clear to the jury that we do not concede that the figures or the projection of the expenses by the government are proper?

THE COURT: Of course. This, after all, ladies and gentlemen, is close to the heart of what this case is about. All this piece of paper, Exhibit 165, contains is a recomputation of what the tax liability would be if those amounts attributed to the five truckers about whom we have heard so much were eliminated on the basis of the government's claim that they were not proper deductions because they were not genuinely payments for expenses.

Now obviously the defendants don't concede that those were improper expense deductions, but all you have is a computation which poses a question for you: Was there this discrepancy, this difference between the income reported and the tax reported, and what should have been reported, based on the government's claim that these five trucker expense deductions were improper because they were not really incurred as expenses.

Does that state your caution, Mr. Rosenthal, as you desired it?

MR. ROSENTHAL: Yes, Judge.

THE COURT: Is there anything you want to add or subtract, Mr. Silverman?

MR. SILVERMAN: No, your Honor.

THE COURT: Mr. Brill?

MR. BRILL: No, your Honor.

THE COURT: Okay.

MR. SILVERMAN: Your Honor, at this time I can expendite this. May I hand a copy of Government's Exhibit 165 to every juror?

THE COURT: Yes.

(Mr.Silverman hands to the jury.)

BY MR. SILVERMAN:

Q Mr. Buchbinder, I would like to call your attention to the top half of this exhibit as it is entitled "Taxable Income".

The first column relates to the fiscal year; is thatcorrect, sir?

A That is correct.

Q What are all the figures in the second column?

A In the second column --

MR. BRILL: Your Honor, isn't this now all in evidence and does it have to be gone over?

THE COURT: Well, I do not think it does any harm since all of you seem to agree that it tends to relate to a central matter in the case.

I will allow it.

A The second column pertains to the taxable income figures per the returns.

Q And what is the second column that says "Corrected" on the top?

A The second column is the total -- if you add the amount found in the per return column with the alleged increase, that is the second column -- that would be the total of the two.

Q And the last column, is that the amount being alleged by the government that is still due and owing?

A That is the amount that the government alleges is the amount of taxable income which is the increase.

Q Now in the second or bottom portion of this exhibit, where it says "Tax Liability," the first column relates --

THE COURT: Let us make sure, Mr. Silverman, that your question is not misleading to the jury -- and I am sure it was not intended.

The upper half does not relate to amounts due and owing to the government; it relates to alleged increases in income --

MR. SILVERMAN: Yes, your Honor.

THE COURT: -- on which a tax would be due and owing. It is the lower half which has smaller figures

that relates to the tax liability, isn't that correct?

MR. SILVERMAN: Absolutely.

THE COURT: Okay.

BY MR. SILVERMAN:

Q Now, Mr. Buckbinder, in reference to the bottom half of this exhibit that is entitled "Tax Liability," the first column refers to the four years in question; is that correct, sir?

A That is correct.

Q What information is contained in the second column that is entitled "Per Return"?

A That is a tax as shown per the tax return, sir.

Q And what is the next column entitled "Corrected"?

A The "Corrected" would be the tax per the return plus the alleged deficiency, would give you the corrected tax.

Q Do you know who computed the alleged deficiency that you just stated?

A I did.

Q And is it accurate to state, sir, that for the four fiscal years in question the amount and the alleged deficiency or tax liability due to the United States Government is $74,112.18?

A That is correct.

MR. SILVERMAN: I have no further questions.

THE COURT: Is there additional cross examination, Mr. Brill?

MR. BRILL: There is some cross examination, your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. BRILL:

Q Mr. Buchbinder, in order to find the correction in the second column of the upper half of Exhibit 165, you told us you added columns 1 and 3?

A That is correct, sir.

Q You did that for each year.

A Yes, sir.

Q Now Column 3 was a figure that you arrived at on the basis of something submitted to you?

A Yes, sir.

Q What was that?

A I received these figures from the Special Agent's report.

Q And you just took those figures as they were?

A Yes, sir.

Q So all you did was simple arithmetic -- addition.

A Well --

Q Is that right?

A I think there was a little bit more to it than that, but basically --

Q Basically, isn't that what it comes down to?

A Yes, sir.

Q You added Columns 1 and 2 and as a result you got Column 3?

A No, added Columns 1 and 3 and got --

Q You added Columns 1 and 3 and got Column 2?

A Correct.

Q With respect to Column 3 did you take into account the volume of material excavated?

A No, sir.

Q With respect to Column 3 did you take into account the capacity of the dump trucks required to remove the --

THE COURT: Mr. Brill, you know he did not do that. I want you to keep that, as I have directed you more than once, for your case. Now proceed to cross examination within the scope of the direct.

MR. BRILL: I respectfully except.

BY MR. BRILL:

Q Is it true that with respect to the lower half under the heading "Tax Liability" that you took the

figures in Column 3 and merely added them to Column 1 to get the result which you have set forth in Column 2?

A Not exactly, sir.

Q Well, isn't that what you did? You added them up and put them together?

A But you have to arrive at this thing first. In other words, computations had to be made.

Q Did you make the computations?

A Yes, sir.

Q And on those computations you took the figures submitted by Mr. Ayres?

A Yes, sir.

Q And that is all you took into account.

A That's correct, sir.

Q You had no figures of your own except the net result which is reflected in Column 2, isn't that correct?

A No figures of my own, that is correct.

Q And the figures in Columns 1 and 3 were already contained in the document that you received from Mr. Ayres?

A Basically, yes.

Q So that basically --

A Let me amend that. Just the taxable income figures but not the lower part of the form. In other

words, the figures in the taxable income section in Column 1 were from the tax return; in Column 3 they were from Special Agent Ayres' report, but the lower section, the "Tax Liability" section, those are my own figures except for the"per return" figures.

Q And they were based merely on the application on the table to the amount set forth in Column 3 in the upper portion, isn't that right?

A Basically, yes.

MR. BRILL: Thank you, I have no further questions.

THE COURT: Mr. Rosenthal?

MR. ROSENTHAL: I have no questions.

THE COURT: All right, Mr. Buchbinder -- you do not have any, do you?

MR. SILVERMAN: No, your Honor.

MR. BRILL: Could I ask Mr. Buchbinder one additional question?

THE COURT: Yes.

CROSS EXAMINATION CONTINUED

BY MR. BRILL:

Q When was 165 prepared, Mr. Buchbinder?

A A few weeks ago, I believe.

Q Did you appear before the grand jury?

A No, sir.

Q And was this the first time, a few weeks ago, that you prepared these figures?

A Yes,sir.

Q And up to that time you had not made any computations at all?

A No, sir.

MR. BRILL: Thank you.

THE COURT: Okay, Mr. Buchbinder.

(Witness excused.)

MR. SILVERMAN: Your Honor, at this time the government will offer into evidence -- I only have the copies; I believe Mr. Brill has the originals of Government's Exhibit for identification 200 through 204, which are invoices.

MR. BRILL: Before he describes them,your Honor, I want to say I do have them, and I object to them because they relate to a period beyond the scope of this indictment.

THE COURT: Yes.

Why do you think they are admissible, Mr. Silverman?

MR. SILVERMAN: These invoices relate to the five -- to two of the five truckers involved, your Honor. The government is offering these to establish the course of conduct of the corporation and to establish a time table as to when the corporation last dealt with these particular individuals.

MR. BRILL: That would be neither relevant nor material in my view, your Honor.

THE COURT: Are you going to contend that there is some cessation point in this?

MR. SILVERMAN: Yes, your Honor.

THE COURT: All right, the objection is overruled.

MR. BRILL: I respectfully except.

(Government's Exhibits 200 through 204 inclusive were received in evidence.)

MR. BRILL: The originals have already been marked for identification.

THE COURT: What dates do they relate to?

MR. BRILL: 200 relates to September 30, 1970.

201 relates to September 30th.

202 relates to November 10, 1970.

203 --

MR. SILVERMAN: November 1970.

MR. BRILL: -- relates to November 1970.

204 is dated December 15, 1970.

THE COURT: Okay.

MR. SILVERMAN: Your Honor, on the same line the government offers Exhibits 205, 206, 207, 208, 209, which are checks payable to the two named individuals or corporations as listed on those invoices.

MR. BRILL: My objection again, your Honor, is that they exceed the last date referred to in the allegations of the indictment, and I request that they be omitted.

THE COURT: I make the same ruling on the basis of what Mr. Silverman has stated is their purpose, they will be received.

(Goverment's Exhibits 205 through 209 were received in evidence.)

MR. SILVERMAN: The government also offers as Government's Exhibits 210 and 211 the purchase journals for the corresponding periods, your Honor, subsequent to the indictment -- 2-70 through 2-74; and 212, the disbursement journal for the same period -- that enumerates the disbursements and the billings made in regard to these checks and these invoices.

THE COURT: What period do those purport to cover, or do they cover?

MR. SILVERMAN: 2-70 --

THE COURT: February 1970?

MR. SILVERMAN: It would be actually March 1, 1970 to February 1974.

MR. BRILL: I object to those, if your Honor please. Certainly even on the basis of the theory

advanced by the prosecutor those after December 15, 1970 under no circumstances can be considered as admissible.

MR. SILVERMAN: Your Honor, the government is offering them on the ground that several of the invoices which are enumerated in the purchase journal of the corporation do not have checks that were issued in payment of those invoices. The government thinks that is relevant on the ground that if these bills were received from corporations who were doing business or individuals who were doing business with the corporation, I think it is relevant to the fact that they have not been paid and they have not requested payment, and that the cash disbursements journal would indicate that there has not been payment of those invoices.

THE COURT: You are going to claim that there is some time after which there were no apparent dealings with these five names -- is that your position?

MR. SILVERMAN: Yes, your Honor.

THE COURT: And that is the only purpose of these exhibits?

MR. SILVERMAN: Yes, your Honor.

THE COURT: All right, they will be allowed for that purpose.

MR. BRILL: I respectfully except.

(Government's Exhibits 210, 211, 212 were received in evidence.)

MR. SILVERMAN: Your Honor, the government rests.

THE COURT: Why don't I at this point, which is a convenient and suitable time, give the members of the jury a somewhat early recess, and perhaps it will be about 15 rather than our usual ten minutes.

(Jury leaves courtroom.)

THE COURT: Are there motions, Mr. Brill?

MR. BRILL: Yes, your Honor.

First, your Honor, I move to strike pursuant to your Honor's permission to make this motion, Exhibits 61, 62 to 65 inclusive, 172 and 173.

I might state what the exhibits are, your Honor.

61 is the transcript relating to the individual tax return of John Aurrichio for the period involved here, 1965 to 1970.

62 relates to the transcript produced by the State Department of Taxation and Finance which negatives any filing by Michael Catenzaro during that same period.

63 is the same with respect to Anthony Ferrotta.

64 is the same for Arthur Lazravitch.

65 is the same for Thomas Tuccella.

I move also to strike Exhibits 66 through 70 inclusive, being those transcripts relating to the filing or non-filing ofthe forms 2290, the highway use tax forms by those designated names.

172 is the series of scheduled prepared by the witness Rizzo with respect to those five designated names, and Exhibit 173 is the summary of 172.

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I should say in passing that Mr. Rizzo did testify that 172 was obtained from the purchase journal, some checks and cash disbursements journals of Paterno & Sonc, Inc.

I respectfully move to strike Exhibits 99 to 104 inclusive representing payrolls on the Cedarhurst job, which is unrelated to trucking.

Exhibits 123 and 124, which are the super's reports relating to Johnson Avenue but not relating to trucking.

I respectfully move to strike Exhibits 128 and 129, being payroll reports not relating to trucking on the Johnson Avenue job.

With respect to Exhibits 130 to 139 inclusive, there are two categories: 130 to 134 inclusive being the inspector's reports on Johnson Avenue and 135 to 139 inclusive being the work reports which, as I recall it, do not reflect trucking.

I respectfully move to strike Exhibits 140 and 141 which are the reports of Mr. Walter Nebesny which do not report trucking, as I recall it.

Exhibits 142 and 143, which are the superintendent's daily reports also with respect to Johnson Avenue.

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I renew my objection and move to strike Exhibit 165.

I move to strike Exhibit 175, which is the Ferrotta license.

176, the application for the Aurrichio chauffeur's license, and unfortunately, I don't have the numbers but I do move to strike those exhibits, and with your Honor's permission later supply the numbers of them relating to the non-ability of the Motor Vehicle Bureau to find records relating to the licenses of the remaining three designated truckers whose names have been repeatedly mentioned, they being Lazravitch, Tuccella and Catenzaro, in addition to Ferrotta and Aurrichio.

I move to strike the testimony of the witness Burke of the compensation board, the testimony of the witness Johnson through whom were introduced the New York State tax statements, the testimony of the witness Stassollo, witnesses of the New York Motor Vehicle Bureau through whom were introduced the documents relating to the licenses and license applications, and the testimony of Robert Whitney of the Internal Revenue Service, Special Service Section, I think he can be identified as through whom was introduced the tax return of John Aurrichio and the statement with respect to the inability

to find the tax returns of the other designated truckers.

I think that exhausts my notes, your Honor.

THE COURT: It's an exhaustive motion and somewhat exhausting having taken over ten minutes to make, Mr. Brill.

The motion to strike, though it is exhaustive, is without substance and it is totally denied.

As to Exhibit 165, I repeat, since that set of computations is, as Mr. Brill brought out, basically arithmetic that any of us could do, if the defendants or either of them or any of them wish to contend that any of those computations based on the premises which I [illegible] explained to the jury at Mr. Rosenthal's insistence are inaccurate, I will hear those submissions and make for the jury whatever corrections may be warranted.

As to the bulk of the other exhibits I note that these defendants cite in their requests the case of Holland v. the United States, with which I'm sure these able lawyers are familiar, so that they know, as well as any of them, the obligation on the government where it is negativing the existence of innocent facts to show as thorough an exploration as possible to determine whether those facts might exist and therefore when the defendants move, as they have just done, to strike the results of

that investigation in various quarters, one of which could in itself be conclusive, I regard that as being an unsubstantial effort and,accordingly, deny the motion in all those aspects.

Do you have any other motions?

MR. BRILL: Yes, sir.

With your Honor's permission Mr. Rosenthal has just asked if your Honor would mind him making his motion before I proceed.

THE COURT: No. Make your motions. We have used up our 15-minute recess on one motion. I would like you to complete your presentation as crisply as you can.

MR. BRILL: I will.

With your Honor's permission I move to dismiss counts 1 through 5 in which the defendants Paterno & Sons and Michael Paterno are named as defendants on the ground that the government has failed to meet its burden.

I move also to dismiss counts 6 through 8 inclusive in which the defendant Michael Paterno alone is named as a defendant on the ground that the government has failed to meet its burden.

With respect to each of those motions I move

for the direction of a verdict of acquittal.

THE COURT: It's clear to me that that motion must be denied and it is.

Anything else?

MR. BRILL: That's all I have.

THE COURT: Mr. Rosenthal?

MR. ROSENTHAL: I join in the motion to strike made by Mr. Brill and I have an additional motion which relates only to my client to strike, and that is to strike, I think it is, 149, which, your Honor will recall, was a sheet of paper containing the names of three of the questionable truckers which Mr. Rizzo said had been given to him by the defendant Denti, and he twice stated both on direct and again on redirect that he did not know who had actually signed it or written it, that the defendant Denti never said he wrote it and that it was not written in his presence, although he had a legend at the bottom in his own handwriting to the effect that it was written by the defendant Denti.

THE COURT: You want the legend stricken if you don't get your whole motion granted?

MR. ROSENTHAL: I want the entire --

THE COURT: If you don't get that do you want the legend stricken?

MR. ROSENTHAL: I don't think that would gain me anything at this time, your Honor.

THE COURT: I take it it's the legend to which you are primarily complaining since the jury has before it samples of Mr. Denti's handwriting and an expert analysis of that handwriting and it would be permissible for counsel to place before the jury the question whether that exhibit, 149, also contains Mr. Denti's handwriting.

You don't need an expert on that, as you know, so I thought it was the legend that was objectionable. If it is objectionable I would think sympathetically of striking it. The exhibit as a whole I will not strike.

MR. ROSENTHAL: Since it has been before the jury with the legend and I don't believe my motion to strike merely the legend would be of any avail to the defendant, frankly, I think I would have more material in summation with the legend remaining on the exhibit. I do not move to strike the legend.

THE COURT: Your motion is denied.

MR. ROSENTHAL: With respect to the indictment itself, I join in the motion of Mr. Brill with respect to count 1 of the indictment in which my client George Denti is named together with the other defendants.

I also join in his motion with respect to counts 2 through 5 in which my client is named together with the defendant Paterno, Michael Paterno, and I believe also the corporate defendant.

THE COURT: I'm going to ask the clerk to tell the jury we'll need an additional 15 minutes or so, so that they are aware they know we are keeping them waiting.

Proceed, Mr. Rosenthal.

MR. ROSENTHAL: I further move in respect to count 9 in which my client alone is named. I move to dismiss.

THE COURT: When you say you move to dismiss, are you moving for acquittal?

MR. ROSENTHAL: For a judgment of acquittal.

THE COURT: You are saying that the government has not made a prima facie case on those counts? In what respects do you claim that?

MR. ROSENTHAL: I claim there is nothing in the record to show that my client, George Denti, had any knowledge that the -- if you were to assume the theory of the government that the truckers in question, the five names in question, are non-existent --

THE COURT: We are not going to assume anything. There is powerful evidence for that at this

time.

MR. ROSENTHAL: I'm talking about my argument, your Honor.

If I were to assume that the government has established that the five people in question were not in existence, there is absolutely nothing in the record to indicate that my client knew this to be the fact, nor is there anything in the record to indicate that my client made the deductions or had anything to do with the making of the deductions knowing that they were false deductions and knowing that Paterno & Sons, Inc. did not receive the services for which these items or these checks or deductions were made.

There is absolutely nothing in the record to indicate any motive on the part of my client to have or join in any scheme with respect to falsifying income tax returns.

THE COURT: Do you claim the government has to prove a motive?

MR. ROSENTHAL: No.

THE COURT: Tell me what material element of which offense has not been proved prima facie sufficiently to go to this jury.

MR. ROSENTHAL: Knowledge on the part of my

client that the items in question were not in fact deductions made for services rendered to Paterno & Sons, which is basically the charge by the government against my client.

As I understand it, this is the charge against all defendants, that they did knowingly and wilfully take and make deductions for matters that were not in fact furnished to the company and were not in fact necessary expenses of the company in its business.

I say the government has not proven or shown that my client ever knowingly or wilfully made any such deductions or caused any such deductions to be made or aided and abetted in any such deductions to be made, nor have they shown that such deductions were in fact improper and were not in fact made for services rendered to the corporate defendant.

THE COURT: I wanted you to specify because I have not even seen so clear a prima facie case and I wondered why you thought it might be deficient in some respect.

Your motion is denied.

MR. ROSENTHAL: I respectfully except.

THE COURT: I have solicited and received from counsel memoranda on the defense theory which

has been an occasion for some considerable discussion and some wonderment by me. I have considered these memoranda and I come out with the conclusion that I must and will allow the defense to proceed as it proposes to.

My thinking, without trying to spell it out completely because I have not had time to write it out, is very simply this: These defendants, presumed to be innocent must be, if they mean to put in this evidence, to be a source of factual account of the materials that the defense means to put on, that is to say, I can't imagine that this evidence about the amount of trucking can originate with counsel since it does relate to matters of fact and therefore the defense means to put forth the explanation that although there are some 40-odd invoices from five named truckers, although there are some 40-odd checks appearing to be payable and cashed by those five named truckers, although the expenses in question are attributed on the books of the company to those five named truckers, and although that is given as the explanation to the Internal Revenue Service for those expenses, that is specific payment to five specifically named truckers, it is now the factual contention that whether or not those truckers existed and whether or not any money whatever was given to them, actually the jobs

on which these defendants were engaged required a total amount of trucking services in such a quantity that the total claimed for trucking expenses was actually correct even if nothing was ever paid as indicated on the books of the company in the invoices and in its checks.

This is presented notwithstanding the fact that I believe Mr. Brill in colloquy with me has confirmed that private detectives were employed to trace the five named truckers because, indeed, the payments were to them though they are not now discovered.

I might say I don't have any evidence in this record of those private detectives. I have some argumentative references to whether it was ever claimed but I don't think there is any evidence at this time of any such effort.

Having that presentation and having the representation that this is or must be an account of the facts that the defendants believe they are entitled to put forth to help vindicate the innocence which is theirs as a matter of presumption, I think I cnnot preclude that kind of effort in advance and that I should allow it.

The things that the government has said in its memorandum, which I frankly find very persuasive, seem to me to be persuasive ultimately as matters of fact

and not of law, matters that I think had better be argued to the jury rather than to me.

So the defendants in their case may make whatever presentations they wish.

Of course the experts are going to have to have to be qualified and they are going to have to be shown that they have before them facts in the record from which they really can import to infer an amount of trucking expense but then we'll leave it to the jury.

So we are going to proceed on that basis.

am Let me suggest, since I do not think we will be too many days additional that the government ought to have copies of this indictment duplicated for distribution to the jury. I think with a 9-count indictment the jury should have copies when they retire to deliberate. It may turn out some of the counts will disappear. When that happens the government will be put to the trouble and expense of reduplicating revised versions but as of now I suggest that it might be time-saving and desirable to get that mechanical chore accomplished pretty soon.

I think we ought to take five more minutes and then proceed.

MR. SILVERMAN: May I be heard on this subject, your Honor?

THE COURT: Yes.

MR. SILVERMAN: Without getting into an intellectual dispute with the Court, which I know I would find myself on the short end of, I would just like to refer particularly to your Honor's order of Friday requesting the defendants to produce clear and concide requests to charge so that the jury will not be confused if in fact they do prove what they are setting out to prove.

Your Honor, upon reading the requests, especially Request A and Request B, the theories behind both these

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requests, which is or will be the defendants' defense, are totally inaccurate. Even if the defendants prove that a certain number of trucks were required to remove fill from a particular site at a particular time period, the only claim being made by the government is that the expenses paid to these five people were not for trucking expenses -- whether or not they paid for trucking expenses out of some other category, or even out of their own pocket is irrelevant to the case.

The whole case, your Honor, is for the defendants, once the government has set forth and established, which I believe the government has, that these truckers did not receive the money that was listed on the returns, the defendants must then prove and come forward with proof that these truckers did receive the money.

I believe that is the whole crux of the case, and I believe that is what the case law holds on these matters.

THE COURT: I think they claim it does not matter whether these people have existed. They really gave the money to truckers, X, Y and Z, and since they did not take improper deductions they were not attempting to evade and defeat taxes.

I think your Job is to marshal the facts, and

also I think you ought to prepare a request that marshals the facts that should be given to the jury fairly on both sides, and leave that to the jury. But as a matter of law you have not demonstrated to me that if they show these trucking expenses they can be convicted of all counts.

Now one some of the counts -- and on this you might make a memorandum of law -- it may well be that they can be convicted in any event, since it appears that if this is their sole theory, whether they paid X, Y, Z, having made the false statements they said on their records that they paid A, B and C, arguably they could be convicted anyhow -- I am not sure of that; I will receive a memorandum on both sides.

But let me say further, I do not necessarily accept these requests in the words submitted. I do not know that any expert witness would dare to testify to the amount of trucking services that were actually performed for Paterno & Sons, Inc. but I will see about that. The expert may talk about how much dirt has to be moved and how much fits into a dump truck but I would be surprised if an expert actually sits there and says X thousands of dollars of trucking services were in fact bought by Paterno & Sons, Inc. in those years.

We will have to wait and see.

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That seems to be a matter of factual knowledge and not inference, especially when they do not know how fast these trucks and how many red lights they passed, or how overburdened the trucks may have been, and so on. Then that goes to the details of request A, and perhaps other requests but not to the basic theory which I will allow the defense, through their counsel, to present to this jury.

Any other discussion on this subject at this time, gentlemen?

(No response.)

THE COURT: Let us take five minutes and then we will proceed with the defense case.

(Recess.)

THE COURT: Get the jury.

(Jury present.)

THE COURT: Ladies and gentlemen, just to tell you where we are, you heard before your extended recess that the government has rested.

The defendants in a criminal case are not required to put evidence into the record. They may if they wish. The defendants do have evidence to present, and they are proceeding now to that portion of the case.

All right.

J A M E S O ' R E I L L Y, having been previously sworn, testified further as follows:

THE CLERK: Mr. Witness, to remind you that you are still under oath.

For the record will you please restate your name?

THE WITNESS: James O'Reilly.

MR. BRILL: Shall I proceed, sir?

THE COURT: Yes.

I think perhaps you ought to come to the side bar for about just a minute.

(At the side bar.)

THE COURT: I have two related observations or questions at this point, gentlemen.

First, I assume that the grant of immunity to Mr. O'Reilly does not extend to this portion of his testimony, and that he has been told of this.

MR. BRILL: He has not been -- I am sorry, your Honor.

THE COURT: Do you think he ought to be told of this?

MR. BRILL: I think he should be told.

(In open court.)

THE COURT: I hate to have you walking about so much, ladies and gentlemen, but may I ask you to take

five more minutes -- not more than five, perhaps.

(Whereupon, the jury left the courtroom.)

THE COURT: This concerns you, Mr. O'Reilly, directly. I have this legal question that I have raised with counsel, and that is the reason I asked the jury to take a recess.

I believe -- I know that you were granted immunity as a basis for the testimony which the government called you as a witness for. It is my belief that that immunity does not extend to the testimony you will be giving from now on, so that this testimony presumably could be used against you at some future time.

Now related to that, gentlemen, I had earlier a question as to whether I would allow Mr. Silverman, at his request, to bring out that this witness was testifying under a grant of immunity -- his object at that time being to suggest the possible hostility in the testimony. For reasons which may or may not have been adequate, I precluded Mr. Silverman from bringing that out.

I do not think the barrier should persist at this stage of the case when Mr. O'Reilly has been called in turn as a defense witness.

I just express that doubt to you so that in case the subject comes up we do not have to suspend in the

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middle of the testimony.

Is there anything that anybody wants to say on any part of what I just said?

MR. BRILL: With your Honor's permission I will address myself to the latter portion first.

It is my understanding -- and perhaps incorrectly -- that the reason for the exclusion of that question which Mr. Silverman wanted to propound was that, responsive to your Honor's questions to counsel for the defendants, we stated to your Honor that we did not propose to cross examine with respect to that.

THE COURT: Yes.

MR. BRILL: I still adhere to that view, at least speaking for myself.

MR. ROSENTHAL: You speak for both.

THE COURT: I understand you adhere to that view. Nevertheless, where a witness refuses to testify to one side except under a grant of immunity, and then apparently testifies for the other side without invoking his privilege, it seems to me the subject is one that the government may wish to bring out, both as a basis for the kind of examination it conducts and as matter that may go to credibility -- at least it so seems to me. Maybe I am incorrect in that. I would like you to speak to that

if you think I am incorrect.

MR. BRILL: Well, I am not in accord with your Honor's view, particularly in light of the fact that I propose to limit my inquiries with respect to this witness strictly to, I suppose, to what can be called technical matters. I propose through this witness to offer and have introduced in evidence the plans, the photographs and the specifications -- that is essentially what I am going to address myself to.

THE COURT: I understand that but we all know the purpose for which you are offering those. That opens up the subject, and there is a possibility that the government may -- it is up to Mr. Silverman -- he may wish to explore that subject and not be limited to the exact terms of your direct examination.

MR. BRILL: Well, I would respectfully address your Honor's attentionto the fact that your Honor has limited us in cross examination to the scope of the direct, and I respectfully submit --

THE COURT: With respect to this matter of defense, which in the exercise of discretion I think should be kept separate as a defense, in order to avoid the confusion about which you were worried in your request No. 14, I did not want this as part of the government's

because you anticipated the possibility that the
nment's case might cause confusion.

I think it might, too, if your defense were injected
it. Otherwise let the record speak for itself.

I am not generally too religious about confining
le to the scope of the direct when you have been con-
so scrupulously. If you are, so be it.

In any event, if there are any conceivable questions
redibility arising in Mr. O'Reilly's testimony, then
ll let you object to anything that tests credibility,
it is a very rare witness whose credibility may not be
n into question for some reason or other, and therefore
doing all this anticipatory conversing because we have
a prior history with reference to the witness, and the
ation is now somewhat changed.

Mr. Silverman, do you want to speak?

MR. SILVERMAN: Yes, your Honor. So that the
t is clear, I expect to come out of the starting
k by bringing to the jury's attention Mr. O'Reilly's
ingness to testify and the compulsion that resulted in
unwillingness to testify.

THE COURT: Well, I had that feeling you might be
ng that -- whether it is the starting block or some other
ure of speech.

At any event, that is what I was referring to.

MR. SILVERMAN: And I think, your Honor, in all fairness to Mr. O'Reilly, that the questions that I hope to be asking him on cross examination may result in a decision to him that he may have committed some sort of criminal act, and I want him to be aware of that -- that I may be asking questions even though Mr. Brill has said in court that he will be asking questions relating to a technical nature.

THE COURT: Well, Mr. O'Reilly's history with us as a witness may invite that kind of approach -- I am not sure but, anyhow, I want to hear defense counsel on that subject.

MR. BRILL: Your Honor, I think effectively defendants would be denied the opportunity to present the defense which your Honor has indicated, the submission of which would be acceptable for the jury to make a determination eventually --

THE COURT: I am not denying you anything; I am only talking about the nature of the possible cross examination.

MR. BRILL: That is what I am addressing myself to. I cannot possibly make such a decision without the introduction of the plans and specifications. That is the very

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heart, coupled with whatever there is in evidence, which goes to the reception in evidence of the expert's testimony. Now there isn't anything about the authentication which I think your Honor said last week had been established but at which point your Honor stopped because your Honor felt that it might be confusing to have the jury receive the specifications in the course of the prosecution's case. There isn't anything except the pictures and the specifications, and there could be no basis for attack on his credibility, and for permitting now the kind of starting block questions or subjsequent questions that are subgested by Mr. Silverman.

If I were toopen doors which would require the testing of credibility, perhaps the situation might be different.

THE COURT: Well, let me see; is that all you were going to do, is offer those plans and specifications?

MR. BRILL: And the photographs, your Honor. That is all.

THE COURT: And the photographs.

MR. BRILL: Yes.

THE COURT: And is he the only witness who can do that?

MR. BRILL: Well, he was the witness who was on

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those jobs.

THE COURT: Do you think there are going to be real questions of credibility if that is offered, Mr. Silverman?

MR. SILVERMAN: Hopefully on cross examination, your Honor, there will be.

THE COURT: Such as what?

Shall I have Mr. O'Reilly excused?

MR. SILVERMAN: Yes, your Honor.

THE COURT: All right, why don't you step out?

(Whereupon, the witness left the courtroom.)

MR. SILVERMAN: Questions, your Honor, relating to the trucks that worked on individual job sites and to which dumps they removed fill from these plants.

The other job sites that are not being offered, where he was a superintendent as to which job sites were used; whether he has any personal knoweldge as to the number of trucks used at a particular site, as to the smallest amount used on a day and the largest amount used on a day --- questions, your Honor, relating to whether he has any direct knowledge, as to whether any of these trucks dumped fill at another site at which Paterno & Sons, Inc. were or had a construction job.

I believe, your Honor, if the defense is going to be

that these trucking services were performed, I think it is only fair to inquire of the superintendent as to his knowledge of the specific trucking services.

In addition, your Honor, not to try to usurp Mr. Brill's role, but I think there could be ten people that you could think of off the tpp of your head that would be able to get these plants into evidence other than Mr. O'Reilly. There are architects; there are engineers who worked on these sites.

Mr. O'Reilly testified that at numerous sites he was not the only superintendent who worked there. There were foremen who worked there. There are a significant number of people who were not called that are available to the defense who can identify these pictures and these plants.

I think if Mr. Brill seeks --

THE COURT: Yes.

I think I could have allowed it in the first place, but a fair amount of his testimony came out while the government's case was still on before I stopped it, and I think the defendants are going to rely on that. I observed this witness' demeanor between direct and cross, so-called, and I think the subject of his credibility in general and with respect to this specific function may

indeed become a matter of importance when this whole record is placed before the jury. Therefore, I believe, with reluctance, to testify on these subjects for one side and his willingness on the other side is a matter that the government can fairly bring out.

I will allow it.

Let us put him on the stand and get the jury in.

MR. BRILL: Before we do that, your Honor, there is again an obstacle placed in the way of the defense. There is no way in which I can persuade or obtain an immunity for this man on this very limited matter concerning which I seek to examine. He has been fully examined on direct, and there was an opportunity afforded for examination on redirect on what your Honor has characterized in respect of my cross examination, all of that opportunity was available to the prosecutor.

There were no limitations imposed upon him. The record is clear that he chose not to examine when he knew that your Honor was going to require that, although they ahd been authenticated, these plans and these photographs -- or at least some of the photographs, not all of them -- that there was a likelihood that I would recall this man, and your Honor himself indicated that I should recall him in my case. I am doing that now.

Why should his posture be different now than it was before? Why should the prosecutor have the opportunity to take advantage of the inability of defense to obtain a grant of immunity and permit the prosecutor to roam all over the lot when he chose not to do it earlier? That is not the kind of understanding in my view to afford the defendants a fair trial.

THE COURT: Mr. Brill, if Mr. O'Reilly, in response to your subpoena, had come here and pleaded his privilege you would have a strong point, and I wouldgrant him immunity, but he did not come here that way. He came here willingly and voluntarily, and this whole subject was raised by me -- not by you; so it is not the situation you depict at all. It is a difference between a witness who comes for one side kicking and screaming and comes freely and voluntarily for the other side. That is all I am going to allow Mr. Silverman to bring out. We are not going to have debate about the Fifth Amendment before the jury -- and I hope Mr. Silverman understands it. I do not want a discussion on that. You may bring out whatever you want about immunity.

Now put him on the stand and let us proceed.

MR. BRILL: Could your Honor give me enough time to get a subpoena -- he is here, it is true, and he is

here because I asked him to come but in the circumstances I feel it would be unfair if I put him on the stand without the subpoena. It means my going upstairs and getting the subpoena.

THE COURT: No, I am not going to let you get a subpoena. He just came. I am advising him of his rights.

MR. BRILL: Is your Honor granting him immunity?

THE COURT: No, sir. Look, Mr. Brill, you have been at this profession almost as long as I have. This subject is not astonishing to you or foreign to your experience. You did not raise it; I raised it.

Now let us have the witness in.

MR. BRILL: Could --

THE COURT: I will speak to him. Bring him in.

MR. BRILL: I don't recall, your Honor, that he was here under subpoena on behalf of the prosecution. I think he came on a phone call of the prosecutor. I do not think he came pursuant to a subpoena.

THE COURT: The record shows whatever the record shows, and what has happened.

(James O'Reilly reentered the courtroom and took the stand again.)

THE COURT: What are you doing?

MR. SILVERMAN: I would like to get out a sub-

poena.

THE COURT: Is there a subpoena?

(To the witness) When you came here originally was there a subpoena?

THE WITNESS: Yes, sir.

THE COURT: You have not been subpoenaed by the defense?

THE WITNESS: No, sir.

THE COURT: Now, Mr.Brill or Mr. Rosenthal are wrong.

I am going to ask you questions about this case. At some time in the past you pleaded your privilege against self-incrimination. Now, I have understood until this moment that you do not plan to refuse to testify now; is that correct?

THE WITNESS: I was under the impression I was just going to be asked --

THE COURT: Just answer my question. You are not going to refuse to testify now?

THE WITNESS: No, sir.

THE COURT: All right. Now whatever your impression is, you are subject to cross examination here. Now cross examination may not be just a repetition of what Mr. Brill or Mr. Rosenthal asked you -- do you

understand that?

THE WITNESS: I guess so.

THE COURT: Now in that posture you could again plead your privilege against self-incrimination, and nobody at that point could compel you to answer. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: What is your view up to that point?

THE WITNESS: It is hard for me to know -- I think basically I shouldbe protected again. Maybe I should have immunity again.

THE COURT: Well, suppose you don't get it, would you testify?

THE WITNESS: I beg your pardon?

THE COURT: Suppose you do not get it, would you then testify?

THE WITNESS: I don't know.

THE COURT: All right, do you want me to excuse him at this point until you can get a subpoena?

MR. BRILL: Yes.

THE COURT: -- and consider what you want to do with him?

MR. BRILL: Please.

THE COURT: I will excuse you at this time,

Mr. O'Reilly. I know you have in the past been represented by Mr. Brill, because that was brought out on your cross examination.

THE WITNESS: Up until the time I went to the grand jury.

THE COURT: I understand that. I am going to leave it to you and to Mr. Brill and to Mr. Rosenthal whether in consulting with him about your situation here it is sufficient for you to rely on legal advice from them or whether you want to get independent legal advice. I am just telling you that. I am not implying anything or raising any question.

I hope you understand that, Mr. Brill.

MR. BRILL: Yes, sir, and I would like to say for the record that I do not propose to give him any legal advice, and I have not since the time that he appeared before the grand jury.

THE COURT: Okay. So you agree with what I just said.

MR. BRILL: Without question.

THE COURT: And I wanted it to be clear that that does not express any shred of disagreement between any lawyer and me. This is just giving you advice that Mr. Brill might find conflicting as against his obligations

to his clients in this case -- do you understand that?

THE WITNESS: Yes,sir.

THE COURT: So I will, at Mr. Brill's request, excuse Mr. O'Reilly. I do not know how I will proceed if he is subpoenaed and any kind of application is made to me -- I simply don't know.

That is what I tell you, so all of you, if you plan to proceed using Mr. O'Reilly should have that in mind.

I must say that if the purposes of calling him are as sharply limited as those described by Mr. Brill I do not see the necessity for going into all this, but if that is the only way it can be done then we will have to face each question as we come to it.

You are excused at this time.

(Witness excused.)

THE COURT: Call your next witness.

MR. BRILL: May I say, while Mr. O'Reilly is out of the room, that I propose to serve him with a subpoena, and we are hopeful that he will consult his independent counsel with respect to it.

I will call my next witness, your Honor.

THE COURT: All right, let us have the jury in, please.

(Jury in the box.)

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THE COURT: I am aware that was longer than five minutes and I apologize. It was necessary. We are now ready.

M I L T O N J. H E C K E R , called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BRILL:

Q What is your occupation?

A I am a civil engineer.

Q Prior to becoming a civil engineer what education did you have in preparation for that?

A A bachelor's degree in civil engineering from the City College of New York.

Q When were you conferred that degree?

A 1961.

Q Do you hold any professional licenses?

A Yes.

Q What professional licenses do you hold?

A I am a professional engineer in New York.

Q Are you engaged in independent practice or are you employed by an engineering firm?

A I work for a consulting engineering firm.

Q And the name of that firm is?

A Havens & Emerson.

Q How long have you been employed by Havens & Emerson?

A Nine years.

Q What kind of work have you been doing for Havens & Emerson?

A Pretty much general engineering up to the last four years when I have been specializing in specification writing.

Q Did you in 1965 or 1966 do computation work for Havens & Emerson?

A Yes, I did.

Q From what kind of document or documents did you make your computations?

A Well, they would be from drawings basically.

Q Plans and specifications?

A Yes.

Q Did you during that period have occasion to do any computation work on a job at Carmel, New York?

A Yes.

MR. BRILL: Mark this for identification.

(Defendants' Exhibit AW was marked for identification)

Q I show you Exhibit AW for identification and I ask you to tell us if you made the computations which are reflected on that exhibit consisting of nine sheets?

A Yes, I did.

Q Will you tell us, please, from what you made those computations?

A These computations were takeoffs from the plans for the Carmel job.

Q When you say takeoffs, what do you mean by that?

A Well, it's actual measuring in quantities that were used on the job.

Q Did you check those against the plans and specifications for the job?

A Yes.

Q Those are the computations which you made?

A Yes.

MR. BRILL: I offer those in evidence.

MR. SILVERMAN: May I inquire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. SILVERMAN:

Q Mr. Hecker, is that a photostat or is this the original?

A That's a copy of the original.

Q Do you know where the original is?

A No, we don't.

Q Who is we?

A The firm.

Q Did you make a search?

A Yes.

Q Where did you search?

A We searched our offices. We searched for the files for the Carmel job.

Last April we had relocated our offices from the Woolworth Building downtown to Jersey and we are finding certain other documents are not available.

Q You say the Woolworth Building. What is the address of that?

A 233 Broadway.

Q Is that the same building Mr. Brill has his offices in?

A Yes.

MR. BRILL: Your Honor, I think the record should show that I have no connection with Havens & Emerson.

THE COURT: Wait just a second. The record should not show any matters of fact that you just stand up

and volunteer unless you've cleared them with me. Then we will either stipulate or you may take the witness stand.

Please be seated.

MR. BRILL: I am sorry.

Q Where did you get this copy from?

A I had that copy in my own personal file.

Q So this was not a file maintained by the firm of Havens & Emerson?

A Yes.

Q This was your own personal record?

A My own personal copy.

Q This is not a record maintained in the regular course of business by the consulting firm, is that correct?

A Correct.

Q The notations on the page in red pencil, were those notations made by you?

A Yes.

Q When?

A Sometime after the date of that document, which was within days after that.

Q What was the purpose of your putting these red markings and numbers on the page?

A Those were certain changes that we felt should be made in the figures as shown there in black.

Q Who is we?

A The firm.

Q In other words, the firm made the notations or you did?

A I did.

Q These are the figures you felt should be indicated or checked?

A Yes.

Q Did you sign that report?

A No, I didn't.

Q How come?

A It's not normal procedure in our office.

Q But this is your handwriting?

A No.

Q Whose handwriting is it?

A One of the partners of the firm. Those are my figures, though.

Q Those are your figures written on a copy of a report that was kept in your personal file in the handwriting of someone else in the firm, is that correct?

A Yes, sir.

MR. SILVERMAN: I move this document be

excluded.

MR. BRILL: There is no doubt,your Honor, they're his figures, that he checked them, and he has to testified --

THE COURT: Don't argue things that are matters of fact. I have not heard him say anything about checking them. If he did, they are there before the jury.

What is the ground of your objection?

MR. SILVERMAN: Numb er one, it is not the best evidence; number two, it's not a record maintained in the regular course of business bv the firm of Havens & Emerson, and number three, it is not in his handwriting and the only writing on the page are just some numbers that are put down at some time after the date that's listed on this report.

THE COURT: Mr. Brill, are you offering the handwriting notations?

MR. BRILL: I'm offering the nine pages, your Honor.

THE COURT: In full?

MR. BRILL: Yes.

THE COURT: Objection sustained. It's excluded.

CONTINUED DIRECT EXAMINATION

BY MR. BRILL:

Q Have you prior to last Friday ever seen or talked to me in your life?

A No.

Q To your knowledge, have I at any time ever had anything to do with the firm of Havens & Emerson with respect to this or any other matter?

A No, sir.

Q At the time Havens & Emerson were located at the Woolworth Building there were other tenants beside Havens & Emerson and myself?

A That's true.

MR. BRILL: I will have to withdraw this witness at this time and ask for a recess.

THE COURT: How long a recess do you want?

MR. BRILL: I'll have to get on the telephone and get a man from the home office in New Jersey.

THE COURT: Don't you have any witness ready?

MR. BRILL: I have, but that witness can't testify without the foundations, Judge.

THE COURT: We will take his testimony or hers subject to connection but we are not going to keep

everybody waiting while witnesses get phoned up.

You are excused temporarily, Mr. Hecker.

We will recall you if that's Mr. Brill's desire.

Let's proceed with your next witness, Mr. Brill.

MR. ROSENTHAL: I have a character witness here in the meantime.

THE COURT: You may proceed out of order in light of the circumstances.

MR. BRILL: May I leave the room while the character witness is testifying?

THE COURT: Is that agreeable with you?

MR. ROSENTHAL: Yes.

DEFENDANT PATERNO: Yes, your Honor.

THE COURT: All right.

(Witness excused)

G E O R G E H. G R A N T, called as a witness by defendant Denti, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENTHAL:

Q Dr. Grant, what is your profession?

A I am a practicing dentist.

Q Admitted to practice in the State of New York?

A Yes.

Q How long have you been so admitted?

A 1943.

Q Where do you have your offices?

A 1184 Evergreen Avenue in the Bronx and 11 Chester Drive, Rye, New York.

Q Do you know the defendant George Denti?

A Yes, sir.

Q How long do you know him?

A Approximately 20 years.

Q How many?

A Approximately 20 years.

Q Do you know other people who know him?

A Yes, sir.

Q Do you know what the reputation of George Denti is among the people that you know who know him for trustworthiness, honesty, and for truthfulness?

MR. SILVERMAN: Objection, your Honor, as to form.

THE COURT: Tell me specifically what is wrong with the form.

MR. SILVERMAN: I don't believe a proper foundation has been laid prior to that question being asked.

THE COURT: Lay a foundation.

Q You say you know people who know George Denti?

A Yes.

Q Have you ever discussed with or among the people you know who know George Denti as to his reputation among those people?

A Yes, I have.

Q In respect to truthfulness, in respect to honesty, and in respect to trustworthiness, or general moral character, if you will call it that?

A Yes.

Q What is his reputation?

A The greatest and finest.

MR. ROSENTHAL: Thank you.

CROSS-EXAMINATION

BY MR. SILVERMAN:

Q Doctor, approximately with how many people have you discussed Mr. Denti's reputation?

A I would say three or four people.

Q What are the names of those people?

A Joe Bertoli, Mr. Onaroto and Mr. Ercolani,

and I think that's about it.

Q Is that two or three you gave me?

A Three.

Q How often have you discussed Mr. Denti's reputation?

A I didn't sit down formally to discuss his reputation during the course of dental treatment. These are dental patients, not personal friends. During the course of treatment perhaps his name would come up and I have found him to be an absolutely trustworthy --

Q I'm not asking that.

A A general concensus of opinion --

THE COURT: Answer the question.

Q The people you have discussed this with, are they business associates of yours or are they patients?

A Patients of mine.

Q Is your relationship with Mr. Denti one of a business relationship or that of a doctor-patient?

A It's a doctor-patient relationship.

Q The discussions that you had with these individuals relating to Mr. Denti, have they been concerning a personal nature or have they been concerning a business relationship?

A Probably a combination of both in one case.

Mr. Bertoli, I believe, shared offices many, many years ago with Mr. Denti.

Q You yourself have had no business relationship with Mr. Denti?

A Oh, no, other than his being a dental patient.

Q You have not discussed with Mr. Denti any business matters, have you?

A Oh, no.

MR. SILVERMAN: I have no further questions.

MR. ROSENTHAL: I have no further questions.

MR. BRILL: May I recall Mr. Hecker.

(Witness excused)

M I L T O N J. H E C K E R recalled.

(Defendants' Exhibit AX was marked for identification)

DIRECT EXAMINATION CONTINUED

BY MR. BRILL:

Q Mr. Hecker, with respect to Exhibit AW for identification, do you know in whose handwriting, apart from the red notations thatvou made, this appears?

A This is in Mr. Vincent Iaoavaia's, he's a member of the concern.

Q Where is Mr. Iaoavaia now?

A He's on a trip.

Q When is he expected to return to the vicinity of New York?

A Friday evening.

Q Were you present at the time he made the notations?

A Yes.

Q Do you know from what he made those notations?

A From my computations.

Q Is Exhibit AX for identification a document which you have seen before?

A Yes.

Q Did you actually prepare that document?

A Yes.

Q What is it, please?

A It's a summary of the computations which I made.

Q Is it from Exhibit AX that Mr. Iacavaia in your presence wrote Exhibit AW?

A Yes.

Q Does AW include the material contained in AX for identification?

A Yes.

Q Between the time of the preparation of AX,

which by the way is in your handwriting, is it not?

A Yes.

Q Between the time of the preparation of AX for identification and AW for identification, was there a meeting between yourself and Mr. Iaoavaia?

A Yes, there was.

Q Was anybody else present?

A No.

Q In connection with that meeting did Mr. Iaoavaia then take from your computations in your presence the figures in AX and make the entries in AW as you and he agreed upon?

A Yes, he did this at the meeting.

Q At the meeting?

A Yes.

Q Who else was present at the meeting?

A At that meeting when this was --

Q You are talking now of AW?

A Yes. The contractor was present and representatives of our firm.

Q Are you referring to the contractor Paterno & Sons, Inc.?

A Yes, I am.

Q You were present throughout?

A Yes.

Q You saw Mr. Iaoavaia actually write up these figures that are in AW?

A Yes.

Q And they came from AX for identification?

A Yes.

MR. BRILL: I Offer both of them, your Honor.

VOIR DIRE EXAMINATION

BY MR. SILVERMAN:

Q Mr. Hecker, in relation to Defendants' Exhibit AW was this exhibit prepared before or after the red notations were put on there?

A Before.

Q Were you present when that was prepared?

A The figures in black?

Q Yes.

A Yes.

Q Who prepared those?

A Mr. Iaoavaia at the meeting.

Q For what reason did you put the red figures on that document?

A Those were computations within a day or two after the meeting, some of them -- these were just

readjustments of quantities from one category to another and this represents a check of the addition.

Q AX, is that a copy of is that an original?

A That's a copy.

Q Where is the original?

A Once again I don't know.

Q When was the last time you saw the original?

A I can't recall.

Q Whose handwriting is AX in?

A Mine.

Q Who performed the typing on the lefthand side of the page? [illegible] the page?

A One of the office secretaries.

Q Do you know who performed the typing on the lefthand side of the page?

A Not specifically.

Q Are there any initials on the page to indicate who the typist was?

A No.

Q Are all the numbers on this page in your handwriting?

A Yes.

Q Did you sign this report?

A No, I didn't, other than the initial on the

top.

Q When was that initialled?

A At the time of some of the computations.

Q Where did you find this copy?

A This was once again in my own personal file.

Q What other documents do you have in your own personal file in relation to the Carmel job?

A Basically dealing with the computation, the summary of the computation of quantities relating to this job.

Q Before the Carmel papers were lost, were destroyed or whatever happened to them, how large a quantity of papers were they?

A I would say they were two or three cartons, standard packing cartons of legal letter size.

Q Of all those cartons how many photostat copies like these do you have in your personal file out of that whole job?

A Maybe three or four that I had to do with.

Q So you have those three or four cartons you have about 10 or 15 pieces of paper?

A Copies.

Q Why particularly, sir, did you save these particular copies out of those three or four cartons?

A They're the ones that I had worked on and the ones I was directly related to as far as the whole job was concerned.

Q Isn't it true, sir, that AW for identification is not something you prepared?

A It's a summary of my work.

Q But not a summary you prepared?

A That I hand wrote?

MR. BRILL: It's argument. He has testified as to what it is.

THE COURT: You didn't prepare AW, is that right?

THE WITNESS: I did not write it out, no.

Q What was the purpose in the preparation of Defendants' Exhibit AX?

A Comparison of quantities between the original job --

Q What purpose did you have to prepare the quantities?

A To determine what the contractor was entitled to payment for over the original job.

Q What type of items did this relate to?

A Various items of work on the job, earth work, fencing.

Q What do you mean by earth work?

A Excavation, fill.

Q Does it refer to the quantities of excavation?

A Yes.

Q What areas does it refer to in quantities of excavation?

A Specifically?

Q Out of your own knowledge without looking at that.

A What do you mean what areas?

Q Does it refer to the quantity that was actually removed from the ground?

A It refers to quantities as measured from a drawing.

Q Does it refer to the actual quantities of territory or material excavated from the ground?

A No.

MR. BRILL: I object to the question and move to strike the answer, your Honor. There is no way in which that could be done. It can only be done --

THE COURT: Mr. Brill, you keep telling me facts that I assume are in some sense through hearsay or whatever known to you or believed by you, but these facts are not in evidence and I don't wish you to announce

facts any more as ground for objection. If you have factual premises for your objections, please suggest that we adjourn to the side bar. Do that.

MR. BRILL: Yes.

THE COURT: Do you want to do that now?

MR. BRILL: Yes.

(At the side bar)

MR. BRILL: I am advised by engineers, your Honor -- I don't have any personal knowledge of this -- that the computations are based upon the measurements, the length, the depth, the width. They're not made upon the actual physical amount. They have to be based --

THE COURT: Why is that a ground for objection? Why can't counsel bring that out to see whether this exhibit is admissible? If they don't show actual amounts removed then they may not show anything about actual amounts trucked or at least he's allowed to inquire into that. What's the Wigmorian basis of your objection?

MR. BRILL: This is not really a question appropriate on the voir dire. It goes to the authenticity of the document. This question doesn't go to the authenticity of the document.

MR. ROSENTHAL: This goes to the weight.

THE COURT: Voir dire may also go to the relevance, but if it would be a permissible question on cross it is close to permissible on voir dire. I will allow it.

Pay heed to my warning in announcing facts you get from engineers that are unknown to me and of which I will not take judicial notice.

(In open court)

THE COURT: For the jury's information, Mr. Brill's objection is overruled.

(Question read)

BY MR. SILVERMAN:

Q Does Defendants' Exhibit AX refer to the quantities of dirt or excavated material that was removed from that job site?

A Actually removed?

Q Yes.

A No.

Q Does Defendants' Exhibit AX indicate the number of trucks actually used at that particular job site to remove dirt or excavated material?

THE COURT: I think that does go beyond voir dire and I will not allow it.

MR. SILVERMAN: Your Honor, at this time I

move to exclude both documents, first on the best evidence rule and second it's irrelevant to the issues before the Court.

THE COURT: I think the best evidence objection is substantial but I will overrule it.

I will likewise overrule the second.

The documents will be received.

(Defendants' Exhibits AW and AX were received in evidence)

MR. BRILL: I have no further questions of this witness.

THE COURT: Now you may proceed with your cross if you like, Mr. Silverman.

CROSS-EXAMINATION

BY MR. SILVERMAN:

Q Mr. Hecker, did you perform any work besides preparing parts of these documents in relation to the Carmel job site?

A No. My work was totally toward this quantity takeoff.

Q That's the only work you did in relation to the Carmel job?

A Yes,sir.

Q From what source or sources, sir, did you

prepare these documents?

A From the drawings.

Q What did the drawings look like?

A Standard 24 by 36 drawings of various facilities on the job.

Q Which job site did those drawings refer to?

A The sewerage treatment plan site.

Q Was there more than one job site in the Carmel area that your firm was connected with?

A There were sewers constructed under other contracts, yes.

Q Did these reports include the materials that were excavated from those areas?

A No.

Q Do you know where those reports are?

A No, I don't.

Q Do you have any idea as to the quantity of materials that was excavated from those job sites?

A No, I don't.

Q Do you prepare these reports for every job site that you are associated with, that you perform work with?

A We make quantity estimates for every job.

Q Do you make quantity estimates for every job

with which you are associated with while working with this firm?

A No.

Q Could you describe forus the circumstances under which you did not make these type of estimates?

A Well, it matters which particular part of the job I am assigned to. Someone else at various jobs would be assigned different jobs on a particular job.

Q Were you assigned to the other Carmel jobs?

A No, I was not.

Q Do you know who was?

A Not offhand I don't.

Q Do you have any idea where the records are for those jobs?

A No, I don't.

Q Do you have any idea whether they're in existence or not in existence?

A No. I would have to check --

MR. BRILL: This neither comes within the scope of the direct nor is it relevant to this case.

MR. SILVERMAN: I believe it's relevantto determine from this witness who is a member of that firm whether or not there are similar reports for the other

job sites in that Carmel area.

THE COURT: He said he does not know. I think that's enough of that.

MR. SILVERMAN: Yes, your Honor.

Q Can you explain to the jury what factors you take into consideration when determining the quantity of material to be excavated at a particular site?

A Well, we consider the location of the proposed installation. If I'm using a pipe, I determine what elevation this pipe is going to be going in. We determine the existing grade above that pipe and how far down we'll have to excavate. Then we look at the cross-sectional area we have to work in. And then we figure out the volume of the material to be excavated in placing the pipe.

Q Different areas, different job sites, with an equal surface area and depth to be excavated, would they have the same amount of excavating material therein removed?

A It matters as to the particular work on each job.

Q Isn't it a fact that some areas might have been filled with garbage or other material, the fill area, and the quantity of excavating material removed would be

different from a solid rock or mountainous area?

MR. BRILL: He's now assuming facts about which we have no evidence.

THE COURT: Overruled.

THE WITNESS: Repeat that.

(Question read)

MR. BRILL: I object to that question, your Honor.

THE COURT: You did and I overruled it. Please be seated.

Do you remember the question?

THE WITNESS: Yes.

THE COURT: Answer it.

A The exact nature of the material being excavated is of no concern. It's the physical parameters as far as the takeoff is concerned.

Q Irrespective of where the excavation is actually done, as long as the length, the depth and the width are all equal the quantities removed would be the same?

A Yes.

Q Isn't it a fact, sir, that if you have an underground well or spring in one area andvou do not in another you would have a different quantity of dirt

removed?

A Not as it would relate to the computer on the drawing.

Q So inother words --

A If I'm taking it off the drawing all I have are the physical parameters.

Q When you actually got into the ground and started to remove the fill, or the earth that was in this particular location, two different areas might result in different quantities of dirt actually removed?

A Volume no. It would be the same volume.

Q Exactly the same volume whether or not there was an underground spring in one and not in another?

A Yes.

Q What about if there was a cave? Would there be a differnce?

A This is a different condition. This would be a difference. There would be a void there.

Q Were there any voids in the plans youhave examined?

A No.

Q Would they have been on the plans if there was one?

A Depending on where borings were taken.

They were not.

Q Isn't it a fact if borings were taken at one endof a large site and not at the end of the same site there could possibly be a cave or what you call a vacuum in that particular site?

A Quite possibly.

Q In other words, the reports that have been received, AX and AW, all they are are speculations or guesses as to the quantity of dirt of fill that would be removed from a particular job site?

A I guess, yes, you could say that.

Q You have no knowledge as to whether or not the dirt that was removed from a particular job site was carted away or just leveled back in after the construction was over?

A No, I don't.

MR. SILVERMAN: I have no further questions.

REDIRECT EXAMINATION

BY MR. BRILL:

Q Did your firm supervise and eventually approve the job that was done by the contractor?

MR. SILVERMAN: Objection, vour Honor.

THE COURT: Sustained.

MR. BRILL: I have no further questions,

your Honor.

THE COURT: Anything else?

MR. SILVERMAN: No, your Honor.

THE COURT: Mr. Hecker, you are excused.

(Witness excused)

MR. SILVERMAN: Your Honor,at this time I would move to strike the testimony of Mr. Hecker since it's been established that all these reports are speculations of what might have been removed from that particular spot or what he believes might have been removed but in fact are only guesses and should be stricken as such.

MR. BRILL: He testified to the method to which he made the computations. He described the parameters and despite the suggestion, the possibilities by prosecutor, there were none such.

THE COURT: Please, Mr. Brill.

MR. BRILL: In his testimony.

THE COURT: There is not such testimony. He doesn't know. Don't report facts. Recite the testimony.

MR. BRILL: That's what I did.

THE COURT: I didn't so understand it. We'll leave it to the jury.

MR. BRILL: I'm sorry, your Honor.

THE COURT: Go ahead, Mr. Brill.

MR. BRILL: I have nothing else to say.

THE COURT: The witness, so far as I heard him, did say that the figures as to excavation could be called speculations or guesses and that plus what I understood to be his indication that he could not tell you and the figures could not tell you how much was actually dug out and hauled away brings the testimony in my judgment close to being of no value, but I hasten to add that that is a judgment that I'm going to leave to the jury, and my judgment about the facts is of absolutely no consequence for your judgment. Please remember that.

If I leave testimony in the record which I'm going to do in this case, that means that you are to consider it as the soverign judges of the facts and it's your judgment that counts in the end, uninfluenced by these arguments or any views that I have.

If I thought the evidence was absolutely and clearly and necessarily worth less I would strike it, but I am not prepared to say that and therefore I am leaving you to judge the worth of those two exhibits coupled with the testimony of Mr. Hecker and to give those things such weight, if any, as your judgment dictates.

That is for you.

Call your next witness.

Engineering at Columbia University in the fields of civil engineering.

Q Keep your voice up.

A (Continuing) I taught in the School of Engineering at Manhattan College from 1930 to 1954, at which time I resigned.

I rose from the rank of instructor to the rank of Associate Professor, and I taught various engineering subjects, primarily reinforced concrete design, foundation design, and the design of steel structures.

I was director of a materials-testing laboratory in the college wherein we tested all the materials in construction -- steel, concrete, wood, glass, stone, cement, soils, asphalts, et cetera -- and I was also director of the Civil Engineering Research Laboratory wherein we performed rather difficult and abstruse experiments on structures that were particularly difficult to analyze mathematically -- in other words, where we ran out of luck with mathematics we then built a model of the structure, tested it, observed its behavior, determined the stresses within it.

I was consultant also to the City of New York on the design of the Riverside Health Center and the Bloomingdale Library; consultant to the City of New York on

the construction of Pier 81 in the North River, and also to the Housing Authority on the reconstruction of the various piers in Port Newark; consultant to --

MR. BRILL: May I interrupt for just a moment? May we go to the side bar?

THE COURT: Yes.

(At the side bar.)

MR.BRILL: I can't remember when I done this before but I observed the prosecutor smirking, raising his eyebrows while looking at members of the jury.

MR. SILVERMAN: Looking at what?

MR. BRILL: At members of the jury -- and I know that your Honor would not countenance that kind of thing, and I felt it serious enough to bring to the Court's attention.

MR. SILVERMAN: Your Honor, I wasn't smirking at all at the jury. I was looking in the direction of the floor of the jury box because I was listening to Mr. Brill and to the witness. If anything should be brought to the Court's attention it would be the fact that Mr. Brill in this trial -- I have examined the records of several other trials -- has developed three new illnesses that were never brought to the Court's attention, so if anyone is looking for a type of syndrome to check --

MR. BRILL: What illnesses are you talking about?

MR. SILVERMAN: Opacity of the eye, asphyxiation and today need for a drink of water.

If anyone is playing upon the jury's sympathies I would put those to Mr.Brill, not myself.

MR. BRILL: I am just trying to make it clear that there is a basis for the statements which I made, and I believe they were made in the absence of the jury, and I did tell your Honor that my eyes were tired from the weekend, and that I have been to an ophthalmologist just shortly before, if not during the course of this trial.

THE COURT: I do not want to debate that.

MR. BRILL: So far as asphyxiation --

THE COURT: This is the 8th day of this trial, and I have no doubt that the observations you reported, Mr. Brill, are an accurate reflection of your perceptions. I tink in fairness to this still youthful prosecutor I should also say that I have observed his behavior attentively during the course of the trial, and that it has been impeccable, in my observation.

Unfortunately, during the last few minutes I was excessively concerned with the ventilation of the courtroom and had conferred with the deputy clerk, so I had not been watching Mr. Silverman.

If his expression gave offense it is my suspicion that it would be less than conscious, but having been admonished by a seasoned lawyer like you he will, I am sure, take special pains to avoid any semblance of display of reactions before the jury.

I think we can leave it at that -- unless Mr. Silverman has some further comment.

MR. SILVERMAN: The only thing, if there were any sort of grimaces, your Honor, it would be in favor of the witness in that he more than established his expertise in that field, I believe.

THE COURT: I am not so sure, although 25 years being an associate professor is a thing to debate about.

(Laughter.)

MR. BRILL: Thank you.

(In open court.)

BY MR. BRILL:

Q I am sorry to have interrupted you; will you go ahead, please?

THE COURT: Is it conceded that he is qualified, Mr. Silverman?

MR. SILVERMAN: Yes, your Honor.

THE COURT: Well, can we go on, Mr. Brill?

MR. BRILL: Yes.

Q I would just like to ask the question about professional societies and whether or not you have ever held office in them?

A Yes, I have.

I was president of the New York State Society of Professional Engineers and a director of the National Society of Professional Engineers, and I was also president of the Bronx County Chapter of the New York State Society; that is just one part of the New York State Society.

Q All right, sir.

Now, have you within the last two weeks engaged in the making of computations based upon material submitted to you, among which --

MR. BRILL: Will you please mark this for identification.

(Defendants' Exhibits AY and AZ were marked for identification.)

BY MR. BRILL:

Q (Continuing) -- among which are Exhibit AW relating to Carmel (handing).

A Yes.

Q Exhibit AR for identification, relating to a 48-inch watermain located in Bronx County at Watson and other streets -- Olmstead, Starling, Gleba and

Maclay Avenues; Exhibit AS for identification, relating to Bureau of Water Pollution Control, Division of Sewer Design, for a storm sewer outlet -- generally identified as the John Avenue job?

A Yes.

Q And have you also, Professor O'Connell, looked at Exhibits AZ relating to the Johnson Avenue job, and AY relating to the Watson Avenue job (handing)?

A Specifications.

Q Yes.

A Yes, sir.

Q On the basis of your examination of the documents which you have just examined, were you able to make an estimate by way of determination of the volume of soil excavated on each of those jobs?

A I was.

Q And for the three jobs did you arrive at a grand total of the amount of material excavated?

A The three jobs, yes, I did.

Q Can you tell us what was your estimate based on the three jobs, for the total amount excavated?

MR. SILVERMAN: Your Honor, at this time the government is objecting formally to the offer of this evidence, subject to connection of the documents that

Mr. O'Connell will be testifying that he made his estimates on, being received in evidence. So I won't make the objection to his whole testimony but that is the basis for our objection at this time.

THE COURT: Okay.

I take it, Mr. Brill, you are offering this subject to connection?

MR. BRILL: Yes.

THE COURT: It will be received on that basis.

(Question read.)

A The total amount that was excavated, actually dug out of the ground, is 141,507 cubic yards.

Now that is the dirt that is dug out of the ground. It is not the dirt that is trucked.

Q Is there a difference?

A Yes, there is a big difference.

Q Will you explain how the difference comes about?

A Well, the total excavation for the trucks was --

MR. SILVERMAN: Objection, your Honor.

THE COURT: Yes, sustained.

Just tell him what the difference is between those two concepts -- and let me caution you, Mr. O'Connell, the question of how much was trucked may or may not be central in this case, and if you are going to give us figures

that are estimates you will want to make very clear they are estimates rather than actual knowledge.

THE WITNESS: Oh, I will explain why.

THE COURT: When we let you.

THE WITNESS: Yes.

THE COURT: In the meantime just tell us the difference between the two concepts -- one, dug out and, two, trucked away.

MR. SILVERMAN: Your Honor, I do not believe there is any foundation laid as to any computations of material being trucked. The only relevance --

THE COURT: No, he is going to tell him -- I think if we let him he will say not everything is trucked away -- I am not an engineer but I suspect that is what he is going to tell us.

THE WITNESS: No, your Honor.

THE COURT: All right, then tell us what you are going to tell us.

A The first thing when you excavate soil -- the soil that is dug out is in a compacted condition, and when you excavate it you break up the structure of the soil, and the soil bulks and takes on a larger volume.

The second thing is that in jobs, material is not taken to the dump and discarded but some of it is taken to

a storage site, trucked to a storage site for future use and then trucked back again, so that you have double trucking on certain material and single trucking on material that goes to the dump; and all of that material bulks up when you disturb its structure,when you excavate.

Hence, in the truck a cubic yard that was in the dirt is now more than a cubic yard in the truck.

Q Do you have an estimate of the total amount of material excavated that was removed?

MR. SILVERMAN: He has already testified to how much.

THE COURT: He just told us how much was dug out of the ground.

MR. SILVERMAN: That is what Mr. Brill is asking, excuse me.

THE COURT: Now you want to know how much was trucked away?

MR. BRILL: Yes.

THE COURT: Do you still have an estimate of that figure?

THE WITNESS: Oh, yes, your Honor.

Q How do you arrive at that estimate?

A Well, you take what has been dug out and you bulk it by 15 per cent. In other words, any ordinary soil will

bulk 15 per cent when destroyed, when disturbed -- disturbed, not destroyed. By "disturbed" I mean loosened, broken up.

Then we know the amount of backfill that must come back on the job to fill up a trench or any cut --

MR. SILVERMAN: Objection, your Honor. There is no testimony that anything left the job site at this point. All we are talking about is what has been removed and how it expands. There is no testimony that the material ever left the job site.

THE WITNESS: May I continue, your Honor.

THE COURT: Well, tell how you know how much left.

Let me ask you, for example, supposing you are digging a trench for a pipe. You can just leave the dirt there and then shovel a lot of it back in?

THE WITNESS: That would be for a narrow, small pipe trench; then nothing would be done -- I mean trucked.

THE COURT: Wouldn't you take some away because it expanded in volume?

THE WITNESS: You would at the end, yes. You clear it off, on the clean-up job, but that would be only 15 per cent.

THE COURT: How do you estimate on those three

jobs how much was trucked away?

THE WITNESS: I estimate first the total amount of soil that existed. I multiply by 115 for this bulk. Now I know from the specifications what amount of that soil has to be kept on the job for backfill. For instance, on the Johnson Avenue job 25 -- a certain amount was kept for backfill. That had to be handled twice. The balance had to be trucked to a dump.

On the Carmel job there was practically no excavation; it was all brought in from another spot, a borrowed point and brought in and dumped on the job. In other words, the reverse took place at Carmel.

In Watson Avenue they wouldn't allow any backfill. All of it had to be dumped away and the trench filled with pure sand.

In other words, the specifications fix the local conditions for each job. The design of the structure fixes backfill at hand and the backfill of the structure fixes the total excavation that must be made in order to build the structure within that space.

THE COURT: Well, in giving us whatever we are going to let you do, Mr. O'Connell, you are basing this, as I understand it, on the analysis you have made of the drawings?

THE WITNESS: Yes, your Honor, and the specifications.

THE COURT: And the specifications?

THE WITNESS: Yes.

THE COURT: You do not know of your own personal knowledge, for example, that the specifications were in every instance correctly followed, that fresh sand was brought in and in fact backfill taken away?

THE WITNESS: I am not interested in what is brought into the job, unless it is excavated?

THE COURT: But you do not know in fact what happened; you are just judging by what these things call for.

THE WITNESS: Just what the record calls for -- by "the record" I mean the four exhibits.

THE COURT: Yes; go ahead.

Q Can you tell us the years from the material you examined when these jobs were done?

A I don't get you.

Q Can you tell us when, from the materials that you examined, these jobs were done?

A Well, Carmel was done back in '65 and Watson Avenue was done in '66-'67 and '68.

Johnson was done part of '66, '67 and '68. In other words, the documents tell us when the contract was let,

so we can then judge the year in which the work was done.

Q Did you make some estimate of the size of the trucks on the basis of your experience that we used on these jobs to carry away excavated material?

MR. SILVERMAN: Objection, your Honor.

THE COURT: On what ground?

MR. SILVERMAN: He must have one of two ways of basing his opinion -- on personal knowledge, a knowledge of the facts already in evidence in this case. If he has any personal knowledge of the trucks usued.

THE COURT: Sustained. Some trucks were used. Trucks come in sizes.

I am not sure that this is a subject at this point for expert testimony.

You may try to lay a foundation. You have not laid a foundation.

Go ahead.

Q Over the years have you had any experience with the variations in dump truck sizes?

A Oh, yes.

Q And can you tell us what the variations are in respect of particular kinds of jobs?

A Yes.

Q Would you do that, please?

A Yes.

Back in 1937, '40 you had five or six yards was a normal size of a truck. Then after the war it jumped up to ten yards. Now we have 10 yarders, all during the '50s into the '60s.

Then in the latter part of the '60s -- '68, '69 -- we started getting to 12. Now you have 15-yard trucks -- in other words, the larger the truck the more efficient it is.

Also you know the size of the truck from the price charged for that truck per day. Obviously a 15-yard truck commands far more money per day than a 10-yard truck, so from knowledge of the evaluation of the size of the truck and the amount of money charged for the gruck you can tell the size of the truck used on the job.

Q Did you examine any of the exhibits in evidence here reflecting truck charges?

A Yes.

Q And were you able, on the basis of your examination of those exhibits reflecting truck charges, to estimate the size of the trucks used on these three jobs?

A Yes.

Q Can you tell us what your estimate is with respect to the size of the trucks?

A Yes.

Q Will you do that,please?

A Ten yard trucks.

Q Is that ten cubic yards?

A 10 cubic yards, that's right.

Q When you say 10 cubic yards what does that mean? At what level?

A Well, that is water level. In other words, the truck has a body, and if you were to fill the body uniformly to the level of the top of the truck body you would have 10 cubic yards -- in other words, the interior dimensions of a 10-yard truck are about 7 foot 3 wide, 4 foot high and about 10-foot long.

Q And can you tell us on the basis of your estimate what you estimate was the amount of excavated material carried away by -- whether to the stock pile or a dump site, by trucks on each of the jobs?

A On each, yes.

Q Would you do that, please?

A Yes. Total excavation trucked on Carmel was 70,944 yards -- cubic yards.

THE COURT: 944?

THE WITNESS: Yes, 70,944.

A (Continuing) On Watson Avenue it was 54,924 cubic

yards -- roughly 55,000 for our purposes.

On Watson Avenue -- pardon me, I said "Watson". Johnson Avenue, the amount trucked was 62,538 -- 62,500 for our purposes -- a grand total of 180,406 cubic yards.

Q Now --

THE COURT: When you come to a point that is suitable, Mr. Brill, we will stop for lunch.

MR. BRILL: I think this is.

THE COURT: Is it suitable?

MR. BRILL: Yes.

THE COURT: Let us come back at 2:15, ladies and gentlemen.

THE CLERK: Jury is excused until 2:15.

(Luncheon recess.)

AFTERNOON SESSION
2:25 p.m.

MR. BRILL: Could we interrupt the professor's testimony for a minute? I have a city employee outside.

MR. SILVERMAN: That's agreeable, your Honor.

THE COURT: All right.

(Jury in box)

THE COURT: Let me explain to the jury what is happening.

We are going to interrupt the testimony of Mr. O'Connell as we have done once in the past in this trial to fit inthe testimony of another witness.

G I L B E R T T E L L E F S E N , called as a witness by defendant Paterno, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BRILL:

Q Mr. Tellefsen, when for the first time in your life did you talk to me about this case?

A About ten minutes ago.

Q By whom are you employed?

A By the Comptroller of the City of New York.

Q In what capacity?

A Assistant chief engineer.

Q How long have you been in the office of the Comptroller of the City of New York?

A I have been there a year and a half.

Q Prior to that what did you do?

A I worked in the bureau of engineering since 1963.

Q Were you in the bureau of engineering at a time when a certain job known as the Johnson Avenue job was performed?

A Yes, sir.

Q Did you have anything to do with that job?

A Yes. I believe I processed just about every payment on that job.

Q Were you familiar with the specifications and the plans on that job?

A Yes, sir.

Q I show you Exhibit AS for identification. I ask you to tell us whether from your knowledge of that job those are the plans for the Johnson Avenue job.

A Yes, sir. These are the plans. They have additional markings which were not there in the original. I assume this is the contractor's copy.

Q You are familiar with those plans?

A Yes, sir.

Q And with that job?

A Yes.

Q Did you see it through the beginning to the end?

A On a once a month basis.

Q On a regular basis?

A Right.

Q I show you Exhibit AZ and ask you to tell us if those are the specifications underlying those plans.

A Yes, sir. These are the specifications.

Q You were familiar with them during the time of the construction of that job?

A Yes, within limits.

MR. BRILL: I offer AS and AZ in evidence.

MR. SILVERMAN: May we have a short voir dire. I don't want to delay the matter but I want to make sure these are the correct plans involved.

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. SILVERMAN:

Q Did we ever meet when I was working for the City of New York?

A No, sir.

Q In reference to these plans these are not the city's copies, is that correct?

A No, I don't believe they are.

Q Does the city maintain copies of the plans and specs?

A Yes. The Department of Water Resources would keep the original copies.

Q You stated there are certain writings on these pages?

A There were writings in red pencil and so on. That has been added on at a later date.

Q What writings are you referring to?

A These markings here. There are circled manholes, etc.

Q Would that be on all these pages?

A Yes, sir.

pm

Q And your responsibility as to the approving of payments for this particular job, did that come about as to your visible inspection of these sites?

A As well as a view of the engineer's records and inspector's records, and so on.

MR. SILVERMAN: Your Honor, I would not object to the admission in evidence of these exhibits,with the exclusion of any writing on any of these exhibits that is not printed.

MR. BRILL: I don't mind that, Judge.

THE COURT: Okay; they will be received in evidence, then.

(Defendants' Exhibits AS and AZ were received in evidence.)

DIRECT EXAMINATION

BY MR. BRILL CONTINUED:

Q Were you aware during the course of construction of that job that photographs were taken from time to time?

A Well, it is a normal procedure on any city contract to take photographs.

Q I show you Exhibit BA for identification and ask you to tell us whether those photographs constitute a fair representation of that job at the various times in the course of that job (handing).

A (After examining) Yes, they look like the photographs of that job.

MR. BRILL: I offer them in evidence.

MR. SILVERMAN: I object, your Honor. The best evidence to what was in the ground at that time are these plans, and the government is willing to let these plans come in even though it seems quite tangential, and the photographs as to what it looked like are quite tangential.

THE COURT: Well, I will allow it. They will be received.

MR. BRILL: Thank you, sir.

(Defendants' Exhibit BA was received in evidence.)

MR. BRILL: May they be passed to the jury later, your Honor?

THE COURT: Yes.

BY MR. BRILL:

Q Do you know, Mr. Tellefsen, whether the job was completed in accordance with the plans and specifications as finally approved?

A To the best of my knowledge it was, yes, sir.

Q And have you ever seen the original of Exhibit AV? Will you look at that, please, sir (handing).

A (After examining) It may have come across my

desk in my new function as assistant chief. I believe one of my subordinates wrote a report on the final payment, making certain deductions for lack of thickness of the sidewalk.

Q And was that a certificate for final payment or approval of final payment?

MR.SILVERMAN: Objection, your Honor. He said it may have come across his desk.

THE COURT: Yes, only tell us if you know.

THE WITNESS: No, it looks similar to the ones --

THE COURT: Do you know?

THE WITNESS: No.

THE COURT: No, just tell us what you know.

MR. BRILL: All right, I will withdraw it.

I have no further questions, your Honor.

MR. SILVERMAN: No questions, your Honor.

THE COURT: All right, Mr Tellefsen, you are excused.

THE WITNESS: Thank you.

(Witness excused.)

MR. BRILL: Now, your Honor, I have a similar request with respect to another City employee who just arrived, and with your Honor's permission and with Mr. Silverman's consent I would like to dispose of him as well.

THE COURT: Any objection?

MR. SILVERMAN: I do not know what he is going to be testifying to, your Honor. If Mr. Brill will tell me --

MR. BRILL: It deals with Watson Avenue. It is for the purpose of introducing the plans with respect to that.

MR. SILVERMAN: I have no objection if that is the purpose, your Honor.

THE COURT: Very well.

R I C H A R D S I E G E L, called as a witness by the defendants Michael Paterno and Paterno & Sons, Inc., having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BRILL:

Q Mr. Siegel, what isyour profession or occupation?

A I am a civil engineer.

Q And for whom are you employed?

A The City fo New York.

Q How long have you been employed by the City of New York as a civil engineer?

A Since 1964.

Q What is your present position?

A I am the Borough Engineer of the Bureau of Water Supply in the Borough of Bronx.

Q Are you familiar with the job known as the Watson Avenue job?

A Yes.

Q How did you acquire that familiarity?

A I was assigned to field supervision of the job in 19 -- when it started -- I think it was 1967.

Q Were you familiar with the plans and specifications on that job?

A Yes, sir.

Q I show you Exhibit AR for identification and ask you to tell us if those are the plans for the Watson Avenue job (handing).

A (After examining) Yes, these are the contract drawings for the plans for the job.

Q I show you Exhibit AY and ask you to tell us if those are the specifications for that job (handing)?

A (After examining) Yes, that is correct, this is contract document, including the specifications.

MR. BRILL: I offer them in evidence.

THE COURT: Any objection?

MR. SILVERMAN: I would just like to take a look at them, your Honor. I haven't had an opportunity.

THE COURT: All right.

(Mr. Silverman examines.)

MR. SILVERMAN: Just a few short questions, your Honor.

VOIR DIRE EXAMINATION

BY MR. SILVERMAN:

Q Mr. Siegel, these are plans maintained as records by the City of New York?

A These are the contract drawings. These are the drawings that the contractor bids on.

Q That is not the question. Are these maintained by the City of New York?

A These constitute part of the records.

Q In other words, Paterno & Sons asked you to appear and you brought these plans from the City Record, is that correct?

A No, sir, I did not bring over these plans.

Q How did they get from the City of New York to Mr. Paterno's firm?

A There were at least 15 or 20 sets of these prepared. We have some and he had some.

Q I am asking you --

A This set of prints?

Q Yes.

A I do not know which set of prints this is. This is one of perhaps 15 that was made out.

Q The notations that are on the particular documents refer to black crayon and yellow crayon --

A Uh-huh.

Q -- and red crayon?

A Go ahead.

Q (Continuing) Are those notations on the plans maintained by the City of New York?

A I cannot say that, no, sir.

Q And I refer to all the pages that have that type of notations on them.

A No, these --

MR. BRILL: Your Honor, I take the same position with respect to this as I did with respect to the Johnson Avenue plans -- I am not offering the markings.

THE COURT: You are not offering them?

MR. BRILL: Not the markings that he is talking about. The added markings.

MR. SILVERMAN: Then I have no objection, your Honor.

(Defendants' Exhibits AR and AY were marked in evidence.)

DIRECT EXAMINATION CONTINUED

BY MR. BRILL:

Q Were you on the job site with frequent regularity?

A Yes, sir.

Q How often would you say you were there?

A Hopefully every day.

Q All right.

I show you Exhibit AQ and ask you to tell us whether on looking at these you can say if they constitute a fair representation of that job at different times (handing).

A (After examining) They constitute a fair representation of some of the trench work encountered on that job, yes.

(After further examining) Yes, I recognize these -- these were taken on the job.

MR. BRILL: I offer Exhibit AQ in evidence (handing).

VOIR DIRE EXAMINATION

BY MR. SILVERMAN:

Q Mr. Siegel, how many different job sites have you worked on since you worked with the City of New York?

A Completely -- from '64 until today?

Q Yes, sir.

A In construction?

Q Yes, sir.

A Maybe 80.

Q About 80?

A That is --

MR. BRILL: I haven't finished my direct examination, your Honor.

MR. SILVERMAN: This is --

MR. BRILL: On the voire dire?

MR. SILVERMAN: -- On the voire dire.

MR. BRILL: Oh, right.

Q And how long an area, in distance was the Watson Avenue job?

A The contract -- you know, this is sort of sprung on me today, the subpoena, but my recollection is it was in excess of 14,000 feet.

Q So you would say it was at least 2 miles, is that fair, sir?

A Approximately three.

Q And by looking at these pictures of pipe and dirt --

A One of those pictures I recognize --

Q By looking on these pictures of pipe and dirt you can tell that that came from the Johnson Avenue job, sir?

THE COURT: Watson.

Q Watson, excuse me.

A I can tell some of these pictures were ours. I can tell, No. 1, that is our watermain.

Q Is that the watermain that was only used on the Watson Avenue job?

A This watermain may have been used elsewhere.

Q I am just asking you about the ones I showed you.

THE COURT: Just answer his question.

THE WITNESS: I am sorry.

Will you please repeat the question.

(Question read.)

A No,this type of watermain was used elsewhere.

Q These men that are in the picture, are they familiar to you from the Watson Avenue job?

A Not these, but some of the others were -- not in this particular picture, no.

Q And the dirt that is in this picture, is that dirt familiar to you from the Watson Avenue job?

A Not specifically.

Q How about the dirt in this picture, sir (handing)?

A The dirt in this picture, sir? No.

Q How about the men in this picture?

A One of these men is familiar to me. I do not know

his name but one of them is familiar to me -- two.

Q And by looking at the pictures of these two men you are able to determine that these were the men --

A No, sir.

Q -- that worked on the Watson Avenue job?

A No, I cannot. However -- okay. I was told --

Q Now looking at this picture of this man with the checkered shirt and this dirt, is that familiar to you as the Watson Avenue job?

A Not this picture alone, no.

Q Looking at all these pictures --

A This takes --

Q Will you please let me finish?

A I am sorry.

Q Looking at all those pictures, sir, of the men and the dirt and the bricks that are in it, can you identify that as looking familiar to the Watson Avenue job?

A No, sir, not from these pictures that I have here.

Q Now we have three additional pictures that show a schoolyard and some pipe.

By looking at that picture can you tell that that was part of the Watson Avenue job (handing)?

A (After examining) Yes, sir.

Q How can you tell that? What school is that?

A I don't know what school that is but this is the Bronx River Parkway crossing, I believe. I don't know what school that is but this looks to me like the Bronx River Parkway crossing.

Q By looking at the Bronx River Parkway crossing and that piece of pipe and that dirt you can tell that that was Watson Avenue?

A This picture alone?

Q Yes, sir.

A (After examining) I would have to go out there, to tell you the truth, looking at this one picture, but it looks to me like the Bronx River Parkway crossing on this contract.

Q By looking at this piece of pipe and this dirt and these trucks and these men, does that look like the Watson Avenue job, sir (handing)?

A Yes, this does.

Q And how do you form that conclusion, sir?

A It looks to me, if my memory is correct, that this is Watson Avenue west of the Bronx River Parkway crossing, west of where this picture was taken (indicating).

Q And at what intersection is that, sir?

A I can't remember which street it is but if I had a map I might be able to tell you -- where we came out of

Parkway area, if I am correct, and on Watson Avenue facing west, and I can't off the top of my head remember the street, but I would say it was the first or second street west of the Bronx River Parkway and Watson Avenue.

Q Now, sir, by looking at this last picture does that picture reflect the construction work at the Watson Avenue job (handing)?

A (After examining) I believe so. This looks to me like Watson Avenue east of the Bronx River Parkway.

Q At what intersection?

A North of the housing project, and I can't recall at what intersection. It is in the vicinity of Rosedale, maybe a couple of blocks off.

MR. SILVERMAN: I have no further questions on the voire dire, your Honor. I move to exclude these pictures.

THE COURT: Well, they are excluded.

MR. BRILL: Even those that he recognizes?

THE COURT: If you want to select two or three he recognizes.

DIRECT EXAMINATION CONTINUED

BY MR. BRILL:

Q If you want to select those you recognize.

A I will not select these. The last three you gave me, based on my recollection today I would state that this was the Watson Avenue job, and these two are, and this one. I believe all of these are at the locations.

MR. BRILL: I offer as AQ1 these three photographs.

(Pause)

THE COURT: We will receive them.

(Defendants' Exhibit AQ1 was received in evidence)

MR. BRILL: I think your Honor has already received AR and AY, with AR being the plans and AY being the specs.

Q In addition to the work required pursuant to the plans and specifications, Mr. Siegal, do you know if Paterno & Sons, Inc. did any utility work there?

A Yes. I believe they did some work for Con Edison and Empire City. I believe they worked for

those utilities.

Q That is your best recollection?

A Yes.

MR. SILVERMAN: I ask the last answer be stricken as to what he believes. It's what he knows.

THE COURT: How are you using "believe"? Is this something you know from your personal knowledge or something you have a hunch about? What do you mean by you believe?

THE WITNESS: He did some relocation of water mains for --

THE COURT: Did you hear my question? Just tell me, please, what you mean when you say you believe. Is it something you know from personal knowledge or something you heard about? What?

THE WITNESS: What I know from personal knowledge is that he did some water main offset paid for by utilities in conjunction with our work. That work I know was done for utilities, work done directly on our drains and paid for by utilities. That work I know he did for utilities.

Q Mr. Siegal, do you know whether all of the excavated material from that job was suitable for back fill?

A We rejected a certain portion of that material.

Q That which was rejected --

A -- was removed from the job.

Q To your knowledge, was the job completed in accordance with the plans and specifications?

A Yes.

Q And satisfactorily so?

A Yes.

MR. BRILL: Thank you. You may examine.

CROSS-EXAMINATION

BY MR. SILVERMAN:

Q Before working for the City of New York where did you work?

A Directly before? I worked for N. A. Orlando Contracting Company.

Prior to working for him I worked for Andrews & Clark, who is a consulting engineer.

Q When you came to the City of New York what position did you come into as?

A I was hired as a provisional civil engineer at that time and I subsequently took examinations and attained other titles.

Q Your present position, is that by appointment or examination?

A Examination.

Q Does the city maintain records in respect to this one specific job as to the quantity of material or fill or soil that has to be removed from a particular job site, meaning this one, Johnson Avenue?

A Yes.

Q Where are those records maintained?

A 1932 Arthur Avenue, our office.

Q Before coming to court today did you have an opportunity to examine those records?

A No, sir.

Q Who contacted you to come here to court today?

MR. BRILL: I don't think that's relevant. We did our best to get him here as quickly and as best --

THE COURT: Why is that relevant?

MR. SILVERMAN: I believe the foundation was what he was asked to bring with him.

MR. BRILL: We can deal with that. We asked that question.

THE COURT: The objection is overruled. Go ahead.

Q Who contacted you --

MR. BRILL: That's not the question.

THE COURT: It's overruled. He has

explained why he's asking it. I'll allow it.

Q Who contacted you to come here to Court?

A Mr. Denti called me.

Q When he called you did he request that you bring with you any documents?

A No, sir.

Q Did he request that you come with the documents that the city has relating to the amount of material or dirt that had to be excavated from that site?

A No, sir.

MR. SILVERMAN: I have no further questions.

REDIRECT EXAMINATION

BY MR. BRILL:

Q How long would it take you to dig out the records to which the prosecutor just made reference?

A I would have no trouble obtaining them. They're in the office up there.

Q They would be available to you?

A Certainly.

Q Could you bring them back tomorrow?

A I would have to check with the city corporation counsel as I did before I appeared today.

Q Before you came here today you checked with the corporation counsel to see if you could respond to this

subpoena?

A That's correct.

Q You were not asked to bring any records with you?

A No, sir. I got very little notice of this whole thing.

Q The excavation records you would have would relate only to the contract, the plans and specifications; isn't that correct?

A Yes.

MR. BRILL: Thank you.

THE COURT: That's all he has been asked to testify about, if I understand you.

Come to the side bar.

(At the side bar)

THE COURT: It sounds to me as though I should direct him to bring them. Doesn't it sound that way to you?

MR. BRILL: I was going to ask him to bring them. I don't know if we will still be on our case tomorrow.

THE COURT: You expect to finish today?

MR. BRILL: I hope to.

THE COURT: Mr. Silverman, do you think he

ought to get them?

MR. SILVERMAN: I would like to see them.

(In open court)

THE COURT: Ladies and gentlemen, take a five-minute recess.

(Jury out)

THE COURT: I take it, gentlemen, the recess was not premature. You have finished your examination of Mr. Siegal?

MR. BRILL: Yes, sir.

MR. SILVERMAN: Yes, sir.

THE COURT: Mr. Siegal, I want you to bring tomorrow at 9:30 the records showing the amount of earth excavated and I want them to be available here for both sides to scrutinize. I think you will have no problem with the corporation counsel if you tell him it's a direction of the court and it might be useful to one side or the other or to neither, but in any event, I think they ought to have an opportunity to look at them.

All right.

THE WITNESS: Yes, your Honor.

Can I get a subpoena for those records? Is that any problem?

THE COURT: You have an oral court order?

per8 Siegal-redirect

MR. SILVERMAN: If there is any problem the gentleman can have Mr. Buxbaum call my office. I am familiar with that gentleman .

THE COURT: If he needs a subpoena, Mr. Silverman or somebody will give it to him.

Counsel, is that agreeable to look at those at 9:30?

MR. ROSENTHAL: We are usually here at 9:30.

THE COURT: Is there any question as to what we want?

MR. SILVERMAN: Just the city's records as to amount of material it projected or concluded had to be excavated.

THE COURT: Preferably the amount actually excavated, because we are going to get estimates on that in this record and want to compare the estimates with the facts.

THE WITNESS: Am I dismissed now?

THE COURT: You are free to take your leave of us. I don't want to dismiss a city official.

9:30.

(Witness excused)

THE COURT: Let's take three more minutes.

(Recess)

D A N I E L J. O ' C O N N E L L resumed.

(Jury in box)

THE COURT: We have completed with Mr. Siegal and we are back now with Mr. O'Connell.

DIRECT EXAMINATION CONTINUED

BY MR. BRILL:

Q Didyou make an estimate of the volume of excavated material carried by each of the dump trucks on the job?

A Yes.

Q Can you tell us, please, how you made that estimate?

A There were ten yard dump trucks so I therefore estimate the usual practice, that you fill a truck to its capacity, namely the ten yard. Some may go out a little less, down to nine and others may have a larger heap on them, ten and a half yards, but the average capacity is ten yards.

Q Did you acquaintyourself with the sump sites, for example, on the Watson Avenue job?

MR. SILVERMAN: Objection, your Honor.

THE COURT: On what ground?

MR. SILVERMAN: How could he possibly know what dump sites were used for that particular job. He was retained a couple of weeks ago.

THE COURT: Mr. Brill, what is your response to that objection?

MR. BRILL: I think he did ascertain --

THE COURT: He was not observing what was going on, did he? He could only ascertain it by hearsay then.

MR. BRILL: Yes, your Honor.

THE COURT: I won't allow that.

Q Is there any indication among the documents that you examined with respect to the location of the dump sites?

A No.

Q Any information which you obtained since then would come within the last few weeks as to the location of the dump sites?

A Except for Carmel, which I knew the dump site was actually the job site, I knew where that existed. As to Watson Avenue, there was only one dump site available.

MR. SILVERMAN: That's objected to.

A Otherwise I know no more.

THE COURT: I'll strike out the volunteered testimony.

THE WITNESS: Sorry.

THE COURT: The jury will disregard it.

Q Did you estimate the number of cubic yards actually trucked from Watson Avenue to the dump site?

MR. SILVERMAN: Objection, your Honor.

THE COURT: On what ground?

MR. SILVERMAN: He estimated the number of cubic yards after being removed from the ground and adding a percentage to it for losing its tightness. Other than that he can't make any other estimations.

THE COURT: Is that what you are trying to elicit?

MR. BRILL: I am trying to find out the basis for his telling us what was the total cubic yardage removed to the dump site.

THE COURT: Do you have such an estimate?

THE WITNESS: Yes, your Honor.

THE COURT: Tell us what you base it on.

THE WITNESS: On the plans, the length of the cut, the depth of the cut as the specifications give, and the necessary width of the cut to handle a four-foot pipe. That gives me the total volume of excavation, and

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there are a few other extra items.

THE COURT: What did you give us as that total volume, your calculation? I didn't write it down.

THE WITNESS: For Watson Avenue, 54,924. That's exactly as I calculate it. That's the bulk volume as trucked.

THE COURT: As excavated?

THE WITNESS: As excavated that's 47,342 cubicyards. That's the volume of the hole.

THE COURT: 47,342 excavated?

THE WITNESS: Yes.

THE COURT: And 54,924 trucked?

THE WITNESS: Yes. Multiply the smaller number by 1.15 and you get the larger one.

MR. SILVERMAN: That estimate is not trucked. That's the estimate of being placed in a truck. We'll agree with the fact that if X number of yards are removed from the ground and of that a certain percentage for losing its bulk, that divided by ten cubic yards per truck would give you a certain amount of trucks. That's as far as this gentleman can determine.

THE COURT: Is that the figure you are about to give us, Mr. O'Connell?

THE WITNESS: I have not been asked yet.

THE COURT: If you are asked --

THE WITNESS: Yes. Counsel is right. I'll divide by ten.

THE COURT: Any objection to his giving that?

MR. SILVERMAN: No, your Honor.

THE COURT: Go ahead.

Q Give us that figure.

A For which job?

Q Watson Avenue since we are talking about that.

A 5,492 truckloads at ten yards per truck. Merely divide the total volume by ten.

Q Did you estimate and have you arrived at a computation as to the number of truck days required to remove thatmuch excavated material?

MR. SILVERMAN: Objection, your Honor.

THE COURT: I'll allow him to answer yes or no.

A Yes.

Q Can you tell us what that figure is?

THE COURT: No, he can't. First you have to lay a foundation and let's hear how he made that calculation without personal knowledge of the dump site and things of

that nature.

Go ahead.

Q Will you tell us, please, how you arrived at the calculation concerning the number of truck days required to haul the amount of cubic yardage of excavated material that you describe on Watson Avenue?

A I had to assume a dump site, your Honor. And then measure the distance from the dump site and then travel said dump site at a given speed and observe the traffic conditions, the number of lights, and so forth, and the roads that the truck would have to travel for the shortest distance.

THE COURT: All right, next question.

Q And did you do that?

A I did.

Q And did you arrive at a figure as to the number of truck days required?

A Yes.

Q Will you give us that figure, please?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Sustained.

MR. BRILL: I respectfully except.

Q Did you ascertain the rental cost of a truck such as you have described from the exhibits in this case -- for example, with respect to Watson Avenue?

A Yes.

Q Can you tell us what the rental cost of a truck such as you have described was?

MR. SILVERMAN: Objection, your Honor.

THE COURT: You mean he is going to take the invoices in evidence and make a calculation from them?

MR. BRILL: He is going --

THE COURT: Is that what he is going to do?

MR. BRILL: Yes, he is going to tell us what the --

THE COURT: He is not an expert on arithmetic

any more than the rest of us.

Objection sustained.

MR. BRILL: I respectfully except.

Q Were you, of your own knowledge, aware of the rental costs of a 10-yard truck in 1966 and 1967?

MR. SILVERMAN: Objection, your Honor.

THE COURT: On what ground?

MR. SILVERMAN: The expenses incurred by this corporation are in issue.

THE COURT: Let me hear what the answer is. I will allow him to answer.

(Question read by the reporter.)

A In New York City?

Q Yes.

A Yes.

Q Will you tell us what that was, please.

A It varied --

MR.SILVERMAN: Objection, your Honor.

THE COURT: Did it vary?

THE WITNESS: It varied, yes, your Honor.

Q Will you give us the variables?

A Between 90 to $96 a day for a 10-yard truck in '67.

MR. SILVERMAN: Excuse me, your Honor, I did not

hear the answer.

(Answer read.)

THE COURT: In 1966?

THE WITNESS: In 1966.

Q And is that 1967 as well?

A No, it went up a few dollars by the time -- well, it went up in 1967.

Q Did you estimate the total cost of trucking of the amount which you have described as being excavated from Watson Avenue during that period, based on those prices?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Sustained.

MR. BRILL: I respectfully except.

Q Based upon the cubic yards of excavated material that you have described, and the cost of the rental of the standard sized trucks that you have described, can you estimate or had you estimated the total cost of the trucking of such cubic yardage?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Sustained.

MR. BRILL: I respectfully except.

Would your Honor see us at the side bar, please?

THE COURT: Yes.

(At the side bar.)

MR. BRILL: May I just ask Mr. Rosenthal a question.

(Mr. Brill confers with Mr. Rosenthal off the record.)

MR.BRILL: There is testimony in the record, your Honor, with respect to the location of the dump sites, and I am about to make an offer of proof based upon a hypothetical question, based on that evidence, with respect to each of the dump sites concerning which there is testimony in the record, to show what he estimates to be the cost of the trucking of the cubic yardage of excavated material that he estimated was trucked.

MR. SILVERMAN: Your Honor, even a hypothetical put to an expert witness is of his own personal knowledge or from the facts in evidence. There are no facts in evidence. There were a few remarks made by one of the witnesses as to what his belief was -- some of the names of some of the dump sites were -- I believe Mr. O'Reilly was on his cross examination at the time, and I do not believe there is any evidence in this case as to each and every job site, as to each and every dump site that was used and as to which trucks went to each and every job site. The truckers who were called by the government have not testified as to the dump sites that they used, nor were they

asked on cross examination, so there is no evidence as to which dump sites were used with respect toeach and every specific job involved, your Honor. So the expert cannot form a conclusion on facts not in evidence.

THE COURT: I think he is absolutely right. You have had the truckmen here. You can get them back -- I will delay the trial to get them back to tell us what the dump sites were, but to have this testimony by Mr. O'Reilly as the sole basis for this edifice, hypothetical edifice as it is, I never heard of a corporation that had to have estimated how much it spent for trucking services.

The real question is, did they really expend what they showed on their books to the people they paid it to; but going back to this, in order to make an estimate we require pretty precise premises from this estimate. I am not even sure that I am willing to accept this associate professor's judgment as to the time it takes a dump truck to go here and there, because I do not think he is expert on that. Those are materials that I think you can get from the truckmen -- you should get, should be able to get even now, and if and when you get them I will let you do that, but for him to make a lot of assumptions about what must have been the dump site when there is no clear evidence as to what the dump site was --

MR. BRILL: There is.

THE COURT: What is the evidence?

MR. BRILL: The testimony of Mr. O'Reilly to which there was no objection and which your Honor received --

THE COURT: What was the Watson Avenue dump site?

MR. BRILL: The Watson Avenue dump site --

MR. ROSENTHAL: Was City Island.

MR. BRILL: No, that is Johnson AVenue. The City Island Pistol Range was the dump site for the Watson Avenue job. It is my recollection that he testified with respect to the Watson Avenue --

MR.ROSENTHAL: Here is Watson Avenue -- page 1241, line 15 (indicating).

MR. BRILL: This is Watson.

MR. ROSENTHAL: Yes.

MR. BRILL: Watson Avenue is to the City Island Pistol Range.

THE COURT: That is the only dump site according to that testimony.

MR. BRILL: And as shown --

MR. SILVERMAN: But that is not the fact -- those are not the facts. There were many dump sites that were used, so far as I know, which are not in evidence,

so Mr. O'Reilly offhandedly mentioned one place for the pistol range.

THE COURT: Is that the only one?

MR. BRILL: No. What he said was, beginning at page 1241, line 14:

"Was there a dump site to which" --

THE COURT: All right, I will tell you, let us resolve this. You cannot represent facts to me any more than Mr. Brill or Mr. Rosenthal. If he gives an answer to this hypothetical basis of one dump site and no others, and there is uncontradicted evidence that in fact there were other dump sites I will strike it.

I think that is a fair resolution of this problem.

Does that seem fair to you, Mr Brill?

MR. BRILL: I am sorry, I was looking --

THE COURT: If you do not now have evidence that there was only one dump site and we get uncontradicted evidence that there were other dump sites then I should strike any evidence that he makes of that dump site.

Do you agree with that?

MR. BRILL: I think that isonly fair.

THE COURT: Then I will do that.

MR. BRILL: But I think, Judge -- but I think with respect to Johnson Avenue --

MR. SILVERMAN: Even if he knows the one job site that was used, it is impossible for him to calculate the amount of money that it would cost a number of trucks to be used to go between the job site and the one dump site.

MR. BRILL: That is a different argument and a different position.

THE COURT: I am not going to allow the amount of money. The invoices are in the record.

MR.SILVERMAN: That is what Mr. Brill is asking the witness.

THE COURT: And you can cross examine him on how many trucks he thinks the invoices called for, and how many 10-yard trucks that invoice calls for. I assume that is what his estimate called for.

MR. ROSENTHAL: But there are other invoices.

THE COURT: These are the ones that seem to me to be of central interest.

I think he should be shown that and whether he based any of his testimony -- I will allow this only on the understanding if the foundation is later on uncontradicted evidence impaired, as Mr. Brill and I have agreed, this testimony will be stricken.

Okay?

MR. BRILL: I would like to address your Honor's

attention to page 1256 with respect to the two different dumps that we used in connection with Johnson Avenue, and there is a description as to the location of those dumps. The witness testified with respect to what he estimated was the mileage to and from those dumps, and whether they required being reached by travelling through city streets, and whether he had traversed the area from the job site to the dump site and he said he had, and that was uncontradicted. It was received without objection.

THE COURT: I understand, and this witness is going to assume what proportion went to which dump site?

MR. BRILL: I do not know that he can do that.

THE COURT: How can he make an estimate?

MR. ROSENTHAL: The distance to the sites on Johnson Avenue are approximately the same.

THE COURT: All right, bring it out -- I will allow that.

(In open court).

BY MR. BRILL:

Q Did you ascertain --

MR. BRILL: Well, can I go to the hypothetical, Judge?

THE COURT: Yes, that is what we agreed you can do. Go ahead.

Q Assuming, sir, with respect to Watson Avenue the dump site was located at the pistol range in City Island, on the basis of that assumption can you tell us whether you, as you indicated earlier, traversed the distance between the job site and the pistol range?

A I did, from the center of the job site -- geometric center of the job site to the Rodman's Neck and the pistol range.

Q And did you then, on the basis of --

THE COURT: Find out what kind of vehicle he was using.

Q Will you tell us, please, the method by which you traversed that distance?

A It was in a station wagon -- Buick station wagon.

Q And at what rate of speed did you traverse that distance?

A At 30 miles an hour.

Q And is that the normal rate of speed, within your experience, for a 10-cubic yard excavated dump truck to travel that distance?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Yes. You will have to lay a foundation for his expertise about the normal rates of speed of dump trucks there or some place else.

Q Did you ascertain first the shortest route between the geometric center of Watson Avenue and the point of the dump site which you described?

A Yes.

Q Can you tell us what that sortest distance was?

A 5.4 miles one way,10.8 miles round trip.

Q Were there -- was that through traffic in the city streets --

A Part of it; part of it wasn't.

Q Were there traffic lights?

A Oh, yes.

Q Have you had any experience at all with the rate of speed at which 10 cubic yard dump trucks normally travel through such conditions as you have described you travelled?

MR. SILVERMAN: Objection, your Honor.

THE COURT: On what ground?

MR. SILVERMAN: His experience is as an engineer.

THE COURT: No, he is asking him that. He may answer it.

A Yes, I was.

Q And what within your experience, sir, is the normal rate of speed for the distance that you traversed for a 10-cubic yard excavated truck per mile?

MR. SILVERMAN: I am going to object to that, because --

THE COURT: Just state that you object.

MR. SILVERMAN: I object.

THE COURT: Sustained.

MR. BRILL: Perhaps your Honor could help.

THE COURT: Mr. Brill, I really can't help you. It seems clear to me, if I may say so, Mr. O'Connell is an expert on certain things and quite clearly not expert on other things; and for you to attempt to make him an expert is a project that is doomed to failure. I do not know how to help you with that. I do not know why you try to make him an expert on the normal speed of dump trucks travelling to pistol ranges in City Island. I do not think they teach you that in Manhattan College as part of the engineering curriculum. I do not know where they teach it, but if you can lay a foundation for him to give that kind of testimony, do it. I am absolutely unable to help you with that.

MR. BRILL: Thank you.

BY MR. BRILL:

Q Have you, in the 20-odd years in which you have been a consulting engineer from time to time testified with respect to matters involving the rate of speed based

upon your experience, your training and your learning -- what you have actually seen of dump trucks traversing such a distance in the area that you described?

MR. SILVERMAN: Objection, your Honor. It would --

THE COURT: No, I will allow that.

A I have observed --

THE COURT: No. He asked you if you testified in other courts to that kind of rate of speed information of dump trucks.

THE WITNESS: No, not testified, no.

THE COURT: That is all he asked you.

THE WITNESS: Oh, I thought --

Q Now, have you personally observed, in connection with your professional activities, the rate of speed of dump trucks traversing such a distance, either loaded or unloaded?

A Yes -- the answer is yes.

Q And on the basis of your observations are you able to give us an estimate of the number of trips from the geometric center of Watson Avenue to that point of the pistol range that you described?

A Yes.

Q Made by such a 10-cubic yard dump truck.

A The round trip number per day, the answer is "yes".

Q And can you tell us, on the basis of your experience at what rate of speed that dump truck would move?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Sutained.

MR. BRILL: I respectfully except.

Q Have you observed in the course of your professional activities the rate of speed at which loaded dump trucks move?

A In the City of New York?

Q Yes.

A Yes -- and outside, yes.

Q And on the basis -- over how long a period have you made such observations?

A Since 1937.

Q And on the basis of your experience are you able to make an estimate of the number of trips involved to be made by a dump truck such as you have described from the geometric center of the Watson Avenue job to the dump site?

A I can.

Q Will you tell us, please, what that is?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Sustained.

MR. BRILL: I respectfully except.

Q Were you able to estimate the --

I think you have given us that figure -- the total number of cubic yards of soil that was trucked to the dump site on the Watson Avenue job?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Mr. Brill, why don't you ask him a hypothetical? If there was a single dump site then it is simply a question of saying the amount that he said was trucked, was taken to that dump site -- yes? Then you do not need that. And if it is more than one dump site you certainly do not need that because it is less than useful, so I do not know why you ask the question all together.

Do you understand what I am saying?

MR. BRILL: I think so.

THE COURT: Well, don't you agree? There is nothing here that calls for his expertise. He has already given you his estimate of the amount trucked. It has already been established that he has no personal knowledge whether there was one or more dump sites, so he cannot help you in this regard.

BY MR. BRILL:

Q Based upon the amount which you estimated as having been trucked from the job site can you tell us if you have an estimate of the number of trucks required

to hold the amount of material which you testified to?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Sustained.

MR. BRILL: I respectfully except.

Q Is there, on the basis of the amount of material that was excavated and the amount of material that was taken from the job site -- still referring to Watson Avenue -- a method by which you can estimate the number of truck days required to haul the amount of cubic yardage of excavated material that you described?

A Yes.

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Q Will you tell us how that would be done?

A You know the amount of total yardage. You know what a truck can carry. Therefore you divide the amount of yards by ten and you get the number of truck-loads. In this case practically 5500, that was the amount.

You know the distance from the center of the job and you have the traffic conditions and the distance to the dump.

Knowing the traffic conditions, the number of lights, the throughway he could use part of the way, the condition of the roads, in City Island, the condition of the roads in the Bronx area under the el structure on Westchester Avenue, knowing the legal speed of 25 miles an hour in the city, and knowing that a loaded truck can't do 25 and he does 20 miles an hour, you can estimate the running time.

You must also estimate the loading time at the job.

You must also estimate the dumping time at the dump, which is quite small.

But the loading time at the job depends upon job conditions, whether you are in an intersection or whether you are between intersections, whether you are

under an el structure or whether you are in an open street, so the local job condition, the type of equipment doing the excavating, in this case a back hoe, fixes the time of loading.

You know the traffic conditions, lights and so forth, and you figure a running time based on that, knowing the speed of truck. You add up all the time and divide that into seven hours so you get seven hours of work out of a truck per day. You pay for eight but you get seven, coffee time breaks, waiting time on the job, and so forth, and thus you arrive at the number of round trips per day.

In perfect summer weather you do a little better. In the winter you do a little less. Rainy days you do a little less. So you strike an average. That's the way it's done.

Q In any cimputations that you made, did you take the maximum or the minimum figures?

A For what?

Q For arriving at the estimate of the number of truck days?

A I took a fair average on the high side. I didn't take the maximum and I didn't take the minimum. I took three quarters of the way up.

Q As a result of that were you able to make an estimate as tothe number of truck days involved on the Watson Avenue job?

A I was.

Q Can you tell us what that was?

MR. SILVERMAN: Objection, your Honor. Based upon the witness' own testimony of the 15 or 20 variables that he put in that he would have to take into account in order to determine this speculative figure, it would be impossible for anyone to calculate the number of truck days between two sites that we don't even if those were the two sites.

THE COURT: There are simply too many unjustifiable unknowns in this hypothetical to allow an expert to testify about it.

It appears from evidence in the record that the number of yards of each involved need not have been estimated but probably, at least to some degree, would be knowable.

Passing that we have had testimony from people on the job from one or more truckers readily available, from at least the job superintendent who instead of estimating and calculating could presumably tell us about the size of trucks and the number of loads

and the number of hours.

We have had people here who themselves or through others could give us the actual conditions of driving a dump truck with respect to which, with all respect to him, I do not think this expert has qualified as an expert.

We have had people here who are really available who can tell us about the estimated running time, loading time, and other things not hypothetically but as actually experienced on these various jobs. I'll not allow Mr. O'Connell, with due regard for his expertise, to supply those premises as a basis for the estimate the defense wishes to elicit.

The objection is sustained.

MR. BRILL: I respectfully accept, your Honor.

Q Within the area of your experience as a civil engineer and as a consulting engineer, have you had occasion to estimate or to learn how a job is estimated?

A You mean for bidding purposes?

Q Yes, sir.

A Of course.

Q How extensive is that experience?

A It goes back to 1937 and all the jobs I

designed for my clients -- I had to give them an estimate.

The jobs I built I knew the estimates, of course, and I knew whether we made money or lost.

Q Before construction is actually undertaken those estimates would have to be made, would they not?

A In order to bid the job, yes.

Q That is within the area of your expertise, is it not?

A Naturally.

Q With respect to Watson Avenue in arriving at the total amount of cubic yardage estimated, did you tell us that you looked at the plans and specifications which are in evidence now as Exhibits AR and AY?

A Yes.

Q You determined the amount of material to be excavated?

A Right.

Q With respect to Carmel, I think you told us that you determined the amount of excavated material on the basis of the figures contained in Exhibit AW, is that correct?

A Yes.

Q Would you be good enough to tell us with respect to Carmel whethre you estimated the cost of

digging and hauling the cubic yardage that was excavated and brought back from the fill bank?

A Yes. I estimated a figure but there was very little digging on Carmel, most of it was brought from an area back to the job for the filter and the sludge.

Q Did you traverse that area?

A Yes.

Q On the basis of your experience and having traversed the area were you able to arrive at an estimate of the round trip mileage from the fill bank to the job?

A Yes.

MR. SILVERMAN: Objection, your Honor. The same grounds. He was not retained then. He was retained three weeks ago. How does he know what particular dump sites they used and so forth during that period.

THE COURT: Mr. Brill?

MR. BRILL: I'm sorry. I missed part of it.

(Read)

THE COURT: Mr. Brill?

MR. BRILL: I think I can develop that, your Honor.

THE COURT: All right.

Q Was there a time, Professor O'Connell, when you

were called in as an expert in connection with the job at Carmel?

A Yes.

Q In connection with that job and before its completion did you examine the area of the job site and the fill bank?

A Yes.

Q Did you ascertain as a matter of fact what was the distance from the fill bank to the job site?

A Yes.

Q On the basis with respect to that job are you able to tell us, from your observations and your experience with the details of that, what was the estimated amount of trucking that was done on that job?

A Yes.

Q Would you do that, please?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Sustained.

MR. BRILL: I respectfully except.

THE COURT: The estimated amount of trucking is not a material fact in this case. We all know from judicial and court experience apart from engineering experience that estimates and actualities frequently deviate from each other in quite substantial degrees.

We are not interested in the estimate.

MR. BRILL: They may also come fairly close.

THE COURT: We are not going to rely on the estimate here when there should be available evidence of the actuality.

Q Can you tell what was the round trip mileage from the fill bank to the job site based upon your own observation in Carmel?

A Yes.

Q Tell us what that is.

A Two miles.

Q Can you tell us on the basis of what you observed and what you learned -- incidentally, can you tell us when you found this out?

A 1965, when I was first retained during the construction of the original sewerage plant.

Q Was there a change in the design of that Carmel sewerage plant following the original plans?

A Yes.

Q Was it in that connection that Havens & Emerson, the consulting engineers, came into the picture?

A Yes.

Q At that time were you actually on the site?

A Yes.

Q Were you then familiar with the amount of material that was required to be trucked to the job site from the fill bank?

A Not until I got Havens & Emerson's new set of plans. They made radical changes in the job.

Q On the basis of their design and their changes were you then able to tell?

A Yes.

Q Were you at that job site on or following the time that Havens & Emerson came in?

A I was there as a result of my report that Havens & Emerson was brought into the picture.

Q Was it from Havens & Emerson's takeoff, which is the exhibit before you, that you arrived at the computation of the number of cubic yards trucked on that job?

A Yes.

Q Based upon the number of cubic yards trucked on that job, the distance from the fill bank to the job site, are you able to compute the number of truck days required to be used on that job by the contractor?

A Yes.

Q Can you tell us what that was?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Sustained for reasons I have already indicated.

MR. BRILL: I respectfully except.

MR. ROSENTHAL: Your Honor, I have a couple of character witnesses in the courtroom. They have been here for sometime. I didn't want to interrupt.

May I interrupt at this time?

THE COURT: Mr. O'Connell's testimony has been interrupted a number of times. I'm sure he is as deferential to character witnesses as anybody else. Is he agreeable to that?

THE WITNESS: I would like to finish today.

THE COURT: It's pretty clear you are not going to finish today in any event.

MR. SILVERMAN: In all deference to the Court, I would rather finish with Mr. O'Connell. He has been interrupted several times.

THE COURT: I believe there's that to be considered.

I'm sorry, Mr. Rosenthal. I would prefer whenever possible to accommodate people but I don't think it is fair to any of us, the jury or even me, to have a

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further interruption. I will not allow it.

Let's proceed with Mr. O'Connell.

MR. ROSENTHAL: Yes, your Honor.

MR. BRILL: May I go to the side bar, Judge?

THE COURT: Yes.

(At the side bar)

MR. BRILL: With respect to this subject matter, your Honor, dealing with Carmel, the witness has testified -- I don't have to remind your Honor what the witness has testified to -- but I expect to prove through this witness on the basis of testimony adduced up to this point that in his computation to haul the amount of fill that was required to be brought to the job site 369 truck days using the standard ten cubic yard trucks that were required, and that based upon the truck rentals at that time, the cost per day is $88 and that the total cost to dig and haul the total amount required to be brought to that job was approximately 32,000 -- I don't have the exact figure.

I further propose and offer to prove through this witness that on the basis of the evidence up to this point -- I have to get one paper.

THE COURT: I suppose you would be more

comfortable in the jury room.

Five minutes, I hope.

(Jury excused)

THE COURT: Are you ready, Mr. Brill?

MR. BRILL: Yes, your Honor.

The amount with respect to Carmel, I don't have the exact figures, but it was approximately $33,000. He makes this computation on the basis of his own observations of that job as well as the evidence in the case up to this point.

If permitted to testify he would then make a computation which would be purely an aritmetic computation, I suppose, that on such cost there would be a requirement of such standard trucks of approximately 369 truck days in that job.

I'm off on that. It would be 330 truck days, your Honor, on that job.

Just a moment, your Honor, I have to sit down.

(Pause)

MR. BRILL: I've asked Mr. Rosenthal, with your Honor's permission, to continue with this. I'm trying as best as I can to help him to do this. I just can't do it now, Judge. I'm sorry.

THE COURT: I must say, Mr. Brill, I'm sorry you are not feeling fit and we will suspend if you wish, but it is not helpful to me or to you or to your client just to tell me what ultimately you mean to prove. If you can do it by permissible questions which I have to make a judgment about I'm going to let you. If you can't I'm not. You are dealing with a very peculiar situation.

You have a computation that has filing cabinets filled with unprivileged records. It claims to have paid truckmen certain amounts of money and we are going to go around the barn making estimates of dirt and driving time for dump trucks and sizes of dump trucks and other things about which this expert may or may not be expert, all for the purpose of getting back to figures that so far as I am advised this corporation should have right in its filing cabinets and whether it has them with respect to Aurrichio or Ginsberg or somebody else, it should have them.

In addition, we have had truckmen here, we have had job superintendents, all of whom know about dirt and dump trucks and what they hire and what they didn't hire.

Mr. Ehrlich, don't have conversations while

I'm speaking. It's distracting. I don't like members of our bar to do that.

All of that could move in the direction of establishing some ofthe premises for this ranking expert's computations. Thus far, having listened to the numerous rounds of his alleged expertise in the exercise of what I hope is an informed discretion I have concluded that these bottom line estimates he would give should not be permitted, that all of this by far passes the bounds of permissible expert testimony.

I have tried and I hope I have succeeded not to be influenced in this judgment by other observations about the nature of this kind of estimating to begin with.

Nevertheless, when government counsel stand up and says some of these assumptoins and premises are not within the area of his experties I must rule and if you can get at those ultimate things you want to prove I have already ruled at the outset of this day I'm going to let you. If you cannot, I will not let you. That's the situation.

There is no point in your telling me what ultimate figures for truck expense you believe you can establish.

Your task and Mr. Rosenthal's with whatever help you get from brethern at the counsel table is to proceed in permissible ways if it takes all winter and spring to prove those things and if you can't prove them by an expert who is supposed to know everything about everything then prove them by other means that I should think would be readily apparent in this case.

pm

I am going to leave that to you but I am not going to utterly relax the rules about expert and let this gentleman with his engineering degree, associate professor and all, tell me how fast dump trucks go to City Island five years ago, with different drivers and different companies and tell me the average size of dump trucks, when there is anything that Paterno & Sons ought to know it is the actual size dump trucks it hired, and so on and so forth, through things that I have enumerated at length -- it bores me excessively, ~~ao~~ so you will have to do this correctly. Then when you have done it you can argue these ultimate things. It is not sufficient for an offer of proof to say you mean to prove certain things, if I let the expert tell about things on which I have concluded he is not expert. You have to go ahead on the basis of those rulings, correct or not -- they are the best I can do.

Is there anything you want to add, Mr. Rosenthal?

MR. ROSENTHAL: I most respectfully except to that part of your Honor's statement that the corporate defendant, having filing cabinets full of papers that would, in effect, establish what Mr. Brill has been attempting to establish through the expert. I do not think there is anything in the record that indicates that

mkor

because what is in the record, to the best of my recollection, is that the invoices for trucking, whether it be the questioned truckmen's invoices or other invoices for trucking, were backed up or sustained by what will be backup slips which are no longer in the files -- they have been stripped, and that this was a normal procedure because of the lack of space, plus the fact that they could also be verified by what is known as cost sheets, which are no longer in the files because once a job was finished there was no need for retaining same. So this mass of paper that your Honor has been referring to is not in fact available to the defendants to establish what is involved here.

THE COURT: Mr. Rosenthal, sometimes I do not understand you any more than I understand Mr. Brill. This expert testified that he looked at corporate records to figure out what the trucking situation was.

MR. ROSENTHAL: He looked at bills that are in evidence.

THE COURT: That are in evidence.

MR. ROSENTHAL: Right.

THE COURT: Well, if he can look at them then anybody in the corporation can look at them, and there are checks in evidence, and no evidence of checks missing.

So far as this record reveals, every check ever paid to a trucker is in possession of this corporation.

There is overwhelming evidence to suggest that to me, but I am not sticking at that. I am just saying that would seem to me the direct way of proving trucking expense or of showing why you cannot prove trucking expenses; but I have spent a weekend on it -- I have let you go at this in an indirect way, but you are not going to go at it by making an expert an expert on everything in the world. You will have to do this in direct fashion.

MR.ROSENTHAL: Now Mr. O'Connell, I think, testified in respect to Carmel, that he was physically on the job and that he was physically acquainted where the fill bank was, as I recall the testimony -- that this job did not require a dump site. In other words, material was not excavated from the job and taken somewheres but material was brought from somewheres to the job, and he is in a position to testify of his own knowledge of the location of the fill bank and of the approximate distance.

He is also in a position to testify, your Honor, of his own knowledge of having checked the -- I don't know what you would call it -- the computations of Havens & Emerson -- and from that he was able to arrive at how many trucks were needed for the work that was required, and

knowing how many trucks were needed, knowing how far the dump site or the fill site was, he is in a position to testify as to the number of truck days that were actually required for that job.

Now if that testimony is established we would then be in a position to establish by other testimony the number of bills and invoices in the files of the company concerning trucking at Carmel, both of the questioned truckers and of the truckers that no issue has been raised about by the government, and through that we could establish that if you took the combination -- if you took the so-called questioned truckers' billings and you took the unquestioned truckers' billings, that it would show that this combined work was required, and that what was paid for was received by the corporation.

Now the fact that four or five people -- or there may have been only one for all I know who used four or five names -- conceived an idea whereby he could avoid paying taxes to the government, avoid a lot of responsibilities and did avoid a lot of responsibilities -- does not remove from the situation that the work in question was required by Paterno & Sons, Inc., and that somebody did do the physical work.

THE COURT: And was paid for it.

MR. ROSENTHAL: And was paid for it.

THE COURT: Those checks that are in issue.

MR. ROSENTHAL: That are in issue.

THE COURT: So we go all around through Manhattan college and its whole faculty to get back to the question mark: Who got the money? Because somebody got the money for trucking.

Now to me that is bizarre, but now that you have said it all I am telling you, go ahead and do it. All I am telling you is that you must do it right.

Now I have ruled on the specific questions as they have been put, as I have understood the defense, whatever it signifies to me, and I said I will allow you to attempt it. Whether you succeed or not depends on whether you put the right question and elicit the right testimony. So far with this expert, in my judgment you have utterly failed.

Now I cannot do any more for you than that. I have to rule on the questions as they come, and if Mr. Silverman has objections I am to make decisions on them. I am going to continue to do that.

MR. ROSENTHAL: With respect to Mr. O'Connell, your honor, and with respect to Carmel, we have more than mere expertise or mere hypotheses. We have actual

knowledge on his part.

THE COURT: I have heard the testimony, and thus far I am not going to let you give the bottom line. I am not going to let him estimate the truckloads and number of trips and all that when there were real, genuine, living, flesh-and-blood trucks about which you certainly know through your people, and they can come here -- not the trucks but the people -- to tell us what they know about it -- how many round trips and how many days and how many trucks days and how many loads -- I don't care whether he was there or not. I cannot give you estimates of how long it takes to go up and down the elevators in this building, although I have worked here for many years, and I do not feel he has established his expertise on that subject, among others. I do not think he is able to testify what size trucks were being used. I do not think he is able to testify in fact what the price of the trucks being used was in each instance.

Now I am not going to let him add up those unknown numbers to come up with an allegedly known answer -- and it is as simple as that.

MR. ROSENTHAL: All right. So far as you say that we have people available who can testify as to what trucking was done on any one particular job, I do not think we have

any person.

THE COURT: All right, Mr. Rosenthal, let me withdraw that. It is for you to prove your case whichever way you can. I do not know what is available to you, and I am not supposed to know. I am just going to sit here and rule on procedural questions as they are served up to me. Thus far the rulings have seemed to Mr. Brill and to you to be both undersirable and unsatisfactory, and probably incorrect. They are the best I can do. You just go ahead from there.

All right, it is 4:15. I will get the jury in and excuse them.

MR.ROSENTHAL: Your Honor, would you permit to call two character witnesses that I don't want to bring back here tomorrow?

THE COURT: If they can be gotten on and off quickly.

MR. ROSENTHAL: They are sitting right there (indicating).

THE COURT: Mr. Silverman, I assume I can overrule your objection on that.

MR. SILVERMAN: Yes, your Honor.

THE COURT: Somebody ought to tell Mr. O'Connell that he is excused until 10 o'clock tomorrow morning.

(Jury in the box.)

THE COURT: All right, Mr. Rosenthal.

(To the jury) We are going to interrupt, ladies and gentlemen, for two short witnesses before we conclude with today's work.

MR. ROSENTHAL: Mr. Esposito.

R O B E R T E S P O S I T O, called as a witness by the Defendant Denti, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENTHAL:

Q Where do you live, Mr. Esposito?

A I live in Mahopac, New York.

Q And what is your profession?

A I am a coordinator of the Diagnostic Center, which is a center for multiply-handicapped, mentally-retarded children.

Q By whom are you employed?

A Board of Education.

Q Of the City of New York?

A Yes.

Q Do you know George Denti?

A Yes, I do.

Q And how long have you known him?

A I guess five years -- about five years.

Our children went to the same kindergarten class together.

Q Your children and his --

A And my daughter.

Q -- attend the same school?

A Yes.

Q What school is that?

A Villa Marie Academy in the Bronx.

Q In the Bronx?

A Yes.

Q And did you ever have contacts, social or otherwise, with Mr. Denti and his wife?

A Yes, very many.

Q Where?

A At the Villa. We were both part of the fathers' guild -- I think that is when I met him, and also my wife and I --

MR. SILVERMAN: Objection, your Honor. I hate to interrupt the witness but we concede the fact that they know each other, and that is not relevant beyond that, your Honor.

Q Do you know other people who know Mr. Denti?

A Oh, yes.

Q And have you discussed George Denti's reputation among the people you know who know him for truthfulness?

A Recently or -- I don't understand the question, I am sorry.

Q During the period that you have known George Denti and you know other people know him --

A Yes.

Q -- have you had occasion and have you discussed his reputation for truthfulness?

A Yes.

Q For honesty?

A Absolutely, yes.

Q And for general morality?

A Yes.

Q And what would you say the reputation of George Denti is among the people you know who know him, so far as veracity or truthfulness is concerned?

A Well, he is a very real family man. I was going to say before that we were in --

MR. SILVERMAN: Objection, your Honor.

THE COURT: Don't say what you were going to say, because there is an objection to that.

THE WITNESS: I am sorry.

THE COURT: Just answer the question.

THE WITNESS: Yes.

Q What is his reputation?

A Excellent.

Q For being a truthful person?

A Absolutely excellent.

Q And being an honest person?

A Absolutely excellent.

Q And a person of good morality?

A Absolutely excellent.

Q Have you ever heard anything bad about George?

A No.

THE COURT: You know that is not really material, Mr. Rosenthal. I prefer you did not ask it. The question is objectionable; the answer is stricken.

Anything else?

MR. ROSENTHAL: I have no other questions.

THE COURT: Any cross.

MR. SILVERMAN: No cross.

THE COURT: All right, thank you, Mr. Esposito.

(Witness excused.)

MR. ROSENTHAL: Mr. Onorato.

CHARLES JOSEPH ONORATO, called as a witness by defendant Denti, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENTHAL:

Q Where do you live, Mr. Onorato?

A 2635 Harding Avenue.

Q Where is that?

A In the Bronx.

Q In the Bronx, New York City?

A Yes.

Q What business are you in?

A I am a vice-president in charge of production for the firm of Herzberg Robbins here in New York.

Q And what field are they in?

A We manufacture display items.

Q Mannequins?

A Yes, sir.

Q Do you know George Denti?

A Well, I have had the pleasure of knowing George, I would say, for the last 13 years.

Q Was he ever a neighbor of yours --

A Yes.

Q -- on Harding Avenue?

A Yes, exactly.

George -- I am sorry.

Q He lived right next door to you, didn't he?

A He lived two doors down.

Q Two doors?

A George lived at 2629; I live at 235 Harding Avenue.

Q And do you know other people who know George?

A Well, all the people on the block and people in the neighborhood.

Q And have you ever discussed the reputation of George Denti for truthfulness?

A All I can say is I have always found George --

MR.SILVERMAN: Objection, your Honor.

Q Mr. Onorato --

A Yes, sir.

Q It is not what they found.

A Just answer the question, right?

Q Yes.

A Okay. I understand you.

Would you repeat the question?

(Question read.)

A Yes, I have.

Q What is his reputation among the people you know who know George Denti? What is the reputation of George

Denti for truthfulness?

A I would say I wish I had a reputation like George. It is just tremendous. He is just a terrific person.

Q All right. Have you ever discussed his reputation for honesty?

A The same goes for that, too.

Q Have you discussed it?

A Yes.

Q And is his reputation for honesty as high as his reputation for truthfulness?

A If I can say something I would sum it up -- all I want to say, if you don't mind, sir, is that I have always found him to be honest, trustworthy, reliable, dependable, warm, lovable human being -- that's all I have to say.

If he wants to object he can object.

MR. SILVERMAN: So far as those qualities are concerned, I move that they be stricken out.

THE WITNESS: Well, this is the truth. That is all I have been saying.

THE COURT: Now look, you have been sitting here on your part indicating an awareness as a witness --

THE WITNESS: Yes.

THE COURT: Your job is to simply answer the question.

THE WITNESS: Yes.

THE COURT: I am sure you are able to do that.

THE WITNESS: Right.

THE COURT: Please try.

THE WITNESS: Okay.

THE COURT: That long answer, which is impermissible, as the witness knew, is stricken and the jury will disregard it.

Do you have any other questions, Mr. Rosenthal?

MR. ROSENTHAL: I have no other questions.

THE COURT: Any cross examination?

MR. SILVERMAN: No, your Honor.

THE COURT: You are excused.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: All right, it is 4:25. We are not going to try to give you any guarantees but perhaps to help make the delays that you suffered today more bearable, I think it appears that we will finish this week, which will be a little ahead of the schedule that I gave you. As I say, I am not permitted to guarantee that to you, and we are not permitted, any of us, to be impatient with the lawyers or witnesses if things take longer than we hope or expect, but that seems to be the forecast as of

now, and I thought I would report it to you, subject to change.

We will stop for today and resume at 10 a.m. tomorrow.

Have a pleasant evening.

THE CLERK: The jury is excused until 10 a.m. tomorrow morning.

(Jury left the courtroom.)

THE COURT: Gentlemen, I hope that estimate did not crowd anybody. It sounded to me like that is about where we are heading -- that is, that we will finish this week.

Does that sound about right to you?

MR. BRILL: Hopefully, yes, Judge.

THE COURT: And I gather things are shaping, that the defense expects to conclude tomorrow.

MR. BRILL: I am not prepared to say that, Judge.

THE COURT: All right, then don't say it. I just thought you told me before that you thought you would finish today. I know you have run into some difficulties with my erroneous rulings but we will bear with you as much as necessary.

I just want an estimate so that you and I and our secretaries can plan their time.

I assume we won't be summing up and charging tomorrow.

MR. BRILL: I think that is a fair assumption.

THE COURT: Okay; beyond that I won't press you. We will talk again tomorrow.

Good night, gentlemen.

MR. BRILL: Good night, your Honor.

(Adjourned to Wednesday, February 20, 1974, at 10 a.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Walter Nebesny (Resumed)		1355	1361	
Sidney Buchbinder	1362	1376		
Milton J. Hecker	1418	1440	1446	1446
Daniel J. O'Connell (Resumed)	1449			
Gilbert Tellefsen	1490 1465			
Richard Siegel	1472	1484	1486	
Robert Esposito	1534			
Charles Joseph Onorato	1538			

EXHIBIT INDEX

Government	Identification	In Evidence
165		1371
200 through 204		1381
205 through 209		1382
210,211,212		1384

EXHIBIT INDEX

Defendants	Identification	In Evidence
AW		1440
AX		1440
AY	1453	1475
AZ	1453	1469
AS		1469
BA		1470
AR		1475
AQ1		1482

MR. BRILL: No, sir.

THE COURT: When I last checked we were waiting for one juror, so let us relax and wait for that to occur.

(Informal recess.)

MR. SILVERMAN: There is one matter that can be taken care of before the jury comes in, your Honor. I do knot know whetherMr. Brill or Mr. Rosenthal wants to recall Mr. Siegal from the City of New York. He produced --

THE COURT:Look, if they want to recall him they will. If they don't you will, but let us proceed.

MR. SILVERMAN: I do not, your Honor. If they do not --

MR. BRILL: I will call him, your Honor, to establish a fact about which we had some discussion at the side bar.

THE COURT: Okay.

(Jury in the box.)

THE COURT: Good morning.

THE JURORS: Good morning.

THE COURT: Are you ready, gentlemen?

MR. BRILL: Yes, your Honor. May I recall Mr. Siegal for that one question, your Honor?

THE COURT: Yes.

MR. BRILL: Mr. Siegal, please.

R I C H A R D S I E G A L, having been previously sworn, resumed the stand and testified further as follows:

THE COURT: You have been sworn, Mr. Siegal.

THE WITNESS: Yes, your Honor.

THE COURT: Go ahead.

DIRECT EXAMINATION CONTINUED

BY MR. BRILL:

Q Mr. Siegal, yesterday when you left the stand you were directed by the Court to search your records at your offices and to bring back this morning any records that there are with respect to the amount of material excavated from the job sites, on the Watson Avenue watermain project.

Have you checked your offices to see if there are any such records?

A Yes.

Q Are there in fact any records showing the volume of material excavated on the Watson Avenue job site?

A No, sir.

Q To determine as an engineer the amount of material subject to excavation you would have to look at the plans and specifications, would you not?

A Yes.

Q And make an estimate on that?

A Right.

MR. BRILL: Thank you.

I have no further questions.

MR. SILVERMAN: I offer Government's Exhibit 213 for identification.

(Government's Exhibit 213 was marked for identification.)

CROSS EXAMINATION CONTINUED

BY MR. SILVERMAN:

Q Mr. Siegal, I showyou Government's Exhibit 213 for identification and ask you if you recognize that document, sir (handing).

A Yes, I do.

Q What is that document?

A These are computations for clean fill that was ordered brought into the job and placed on the job.

Q And the computations -- do they relate to Watson Avenue?

A Yes, sir.

Q And were those records maintained by the City of New York in the regular course of their business?

A Yes.

Q I refer you to the last page of this report and

ask you what the figure "15,970.1 cy" stands for?

A That refers to amount of cubic yards of clean fill that we paid for and placed on the job -- excuse me, can I correct something?

Q Yes.

A This is not the total amount.

Q I am sorry. Is there a larger amount?

A The bottom line is the final amount adjusted.

Q And that is 15,961.3 cubic yards?

A That is correct.

Q And that is what the City paid for for the fill in this particular area?

A That is the volume that we paid for, yes.

Q And was that fill provided under the contract with Paterno & Sons, Inc.?

A Yes.

MR. SILVERMAN: I have no further questions.

I would like to offer in evidence Government's Exhibit 213.

MR. BRILL: Objection. This does not relate to the amount or the volume of excavated material. That is what we are talking about.

THE COURT: When you say it does not relate, again that is an issue of fact.

Let me ask you, Mr. Siegel, does part or all of that clean fill replace material which was taken out?

THE WITNESS: All of this clean fill replaces -- went into the trench.

THE COURT: That had been excavated?

THE WITNESS: Yes.

THE COURT: All right, objection overruled; it is received.

(Government's Exhibit 213 was received in evidence.)

REDIRECT EXAMINATION

BY MR. BRILL:

Q Does it replace all of the excavated material that was taken out of that job, Mr. Siegal?

A No, sir.

Q Does it replace only a portion of the excavated material that was taken out of that job?

A It would have replaced a portion.

Q Only a portion?

A That is correct.

Q And you do not have any figures on the total amount of fill excavated?

A No, sir.

MR. BRILL: That is all.

THE COURT: All right, Mr. Siegal.

(Witness excused.)

THE COURT: All right.

MR. SILVERMAN: Your Honor, is it all right if I substitute a copy for the original?

MR. BRILL: I have no objection to that.

THE COURT: In the meantime do you want to call your next witness?

MR. BRILL: Yes.

MR. ROSENTHAL: I have a character witness, your Honor. May I call her at this time?

MR. SILVERMAN: I have no objection.

MR. BRILL: No objection.

THE COURT: Okay.

S I S T E R J A N E F A G A N, called on behalf of the Defendant Denti, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENTHAL:

Q Sister Jane, are you a member of any religious order?

A Yes, I belong to the Congregation of Notre Dame.

Q And are you a teaching sister?

A Yes, I am.

Q And in what school do you teach?

A I teach at Villa Marie Academy in the Bronx.

Q Do you know the defendant George Denti who is seated at the table here?

A Yes, I do.

Q And approximately how long have you known him?

A Six years.

Q And am I correct that you know him as a result of his daughter attending the school where you teach at?

A That is correct.

Q And do you know other people who know Mr. Denti?

A Yes, very much.

Q And what are they -- the parents of other children that attend?

A Yes.

Q What is the name of the school -- Villa Marie?

A Villa Marie.

Q And have you had occasion to talk or to discuss with the people you know who know George Denti his reputation as a law abiding citizen or as a truthful or honest person?

A Yes, there have been occasions.

Q And what is his reputation among the people you know who know George Denti in respect to his honesty,

truthfulness and general law abiding morality?

A While Mr. Denti's children were at our school he was a very active member of our --

THE COURT: No, Sister -- may I interrupt you. You must merely answer questions, please.

THE WITNESS: I am sorry.

THE COURT: Will you repeat the question.

(Question read.)

A He is considered to be an honest man, a generous man and one to whom they can turn.

MR. ROSENTHAL: Thank you.

MR. SILVERMAN: No questions, Sister. Thank you for coming.

MR. ROSENTHAL: Thank you, Sister.

(Witness excused.)

D A N I E L J. O ' C O N N E L L, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. BRILL:

Q Professor O'Connell, having examined the plans and speculations and the computations --

THE COURT: You don't mean "speculations"?

MR.BRILL: Plans and specifications -- thank you.

Q -- and the computations with respect to the Carmel job, which have been introduced in evidence here,

assume that in connection with the construction of a sewage plant in Carmel, a watermain project identified here as Watson Avenue running for approximately three miles, a sewer and sub-sewer project, identified here as the Johnson Avenue job, and the computations from the plans and specifications and computations showing the total area on the three jobs that required excavation and/or fill, and assume that there is testimony in evidence in this case that the total cubic yardage of the three jobs that required either excavation and/or fill was approximately 188,000 cubic yards; and assume further that that amount, approximately 188,000 cubic yards, had to be trucked either from the job site to a dump or storage area, or from a borrow pit or bank fill to the job site; and assume further in connection with the Johnson Avenue job there was a stockpile to which and from which excavated material had to be hauled from and back to the job as fill; and assume further that at the times in question when these jobs were under construction the average normal dump truck had a capacity of 10 cubic yards per truck based on rental charges in the evidence; and assume that the evidence established that the truck rental for the day to average, for the Carmel job, $98.66 a day, for the Watson Avenue job there was 96.80 a day; and for the Johnson Avenue job $102.35 a

day, including taxes; and assume further that the borrow pit from which fillwas hauled to the job site was -- in Carmel -- was about two miles for it; and assume further that there is in evidence in this case that the dump site for the Watson Avenue job was about a mile and a half, within the confines of the pistol range located at City Island in the Bronx, which has been described as approximately ten miles from the Watson Avenue job; and assume further that in connection with the Watson Avenue job the dump site has been described as being in the College Point area, in the proximity of 20th Avenue, approximately 12 or 15 miles from the job site; and assume further that also in connection with the Johnson Avenue job there was another dump site which was located on Flatlands Avenue and Pennsylvania Avenue near Linden Boulevard in the Borough of Brooklyn, which was approximately 9 to 12 miles from the job site; and assume further that to reach the dump sites from the respective job sites it was necessary to traverse city streets in the boroughs of Bronx and Brooklyn respectively, on some of which streets there were traffic lights.

Assume further that there was excavation for utility companies, including Con Ed and the Telephone Company, in addition to the excavation required by the plans and

specifications in connection with the Watson Avenue job; based upon all the foregoing can you, with reasonable certainty, form an opinion as to the total number of dump truck days required to haul the excavated material and/or fill to and from the respective job sites?

A I can.

Q Will you tell us, please, what is your opinion?

MR. SILVERMAN: Objection.

THE COURT: State the grounds of your objection.

MR. SILVERMAN: Your Honor, the question or the hypothetical posed by Mr. Brill contains more variables than knowns. It assumes facts that are not in evidence.

THE COURT: Specifically?

MR.SILVERMAN: Specifically the location of the job sites, the travel time between the job sites; the weather conditions at the time of the year; the distances between the job sites; the time it would take to fill the truck; the time it would take to unload the truck; the places that the truck went to.

I think the whole question, your Honor, borders on being fantasy.

THE COURT: Mr. Brill, the estimates of truck rental costs rest upon the invoices in evidence in this case?

MR. BRILL: On some of them, your Honor.

THE COURT: On some of them?

MR. BRILL: Yes.

THE COURT: Not on all of them?

MR. BRILL: No, sir.

THE COURT: Which ones are not included?

MR. BRILL: I can tell you that those which are included are the X series, Exhibits I and J. The others are not.

THE COURT: The objection is sustained.

MR. BRILL: I respectfully except.

BY MR. BRILL:

Q Now Professor O'Connell, I put to you the same question and ask you if based upon the assumptions contained in that question you can form, with reasonable certainty, an opinion as to the total cost to haul such excavated material from the job sites, to the Watson Avenue and John Avenue job sites specifically, to the dump sites, and to and from the stock pile and from the borrow pit fill at Carmel to the job site at that location.

A Based on the specifications and the plans.

Q And the assumptions which I put to you in the question?

A Yes, if you would add the information "in the

plans".

Q Yes, sir, that is included in the question -- based upon your examination of the plans and specifications and the computations with respect to Carmel as well?

A Yes, under those conditions, yes, I have an opinion.

Q What is your opinion?

MR. SILVERMAN: Objection.

THE COURT: Sustained.

MR. BRILL: I respectfully except.

Your Honor, may we come to the side bar, if your Honor please?

THE COURT: Yes.

(At the side bar.)

MR. BRILL: I offer to prove --

THE COURT: No, no, we spent all evening on this. You just ask questions. I do not want an offer of proof on the same subject.

MR. BRILL: I respectfully except to your Honor's exclusion of my offer of proof.

THE COURT: You may put it in the record later, but you spent the last half hour last night -- you and Mr. Rosenthal -- making an offer of proof. We had a very long conversation. You had overnight to build upon that conver-

sation whatever you wished to do, and I do not want to spend the rest of this trial at the side bar.

Proceed.

(In open court.)

MR. BRILL: May I have Exhibits 1-A to 48-A, please.

(Mr.Silverman hands.)

BY MR. BRILL:

Q I show you, sir, Exhibits 1-A to 48-A inclusive (handing), and I ask you to glance through those -- and then I will have a question for you.

(Witness examines.)

MR. SILVERMAN: I think the record should be clear it only goes to 47-A.

MR. BRILL: 47-A, I beg your pardon -- thank you very much.

THE COURT: May I ask, Mr. Brill, does he know what he is glancing through it for?

Perhaps you can ask him a question so that he will know.

MR. BRILL: I was going to ask him, having examined those, would there be any change in the amounts of truck rentals and whether that would assist him or change any opinion which he is able to express.

A If I understand your question --

MR. BRILL: I was responding to his Honor.

THE WITNESS: Oh, I am sorry.

MR. SILVERMAN: Is Mr. Brill trying to elicit through this witness that by skimming through all these thousands of dollars on each page mathematical computations are being made?

THE COURT: I do not know. Let us see what the question is.

MR. BRILL: The invoices reflect the charges for rental for trucks per day, and what I tried to ascertain is whether his computations with respect to the costs per rental truck per day would be any different than the amlunts which he has already invited me he has computed.

THE COURT: And what you have shown him on the invoices of these five --

MR. BRILL: Yes.

THE COURT: -- alleged truckers whose existence is central in this case?

MR. BRILL: Well, I cannot say that their existence is central.

THE COURT: Well, I can say that -- I have said that.

MR. BRILL: I respectfully except.

THE COURT: That is what you have shown him.

MR. BRILL: I have shown --

THE COURT: Mr. Brill, just so that the jury will know what he is looking ati, that is what he is looking at, whether you agree with the characterization or not; is that correct?

MR. BRILL: Yes, sir, that is correct.

THE COURT: All right.

Mr. Silverman?

MR. SILVERMAN: Your Honor, I believe from Mr. O'Connell's testimony that he had seen invoices before. Is it that he has not seen copies of these invoices before? Is that the reason why he is looking at them?

THE COURT: Is that right, Mr. Brill?

MR. BRILL: Your Honor, I responded directly to the question as to what invoices I showed Mr. O'Connell --

THE COURT: So that Mr. Silverman can understand, he has not seen any others.

MR. BRILL: Those are the only ones I have shown him.

THE COURT: Okay.

MR. BRILL: And I am now showing him Exhibits 1-A to 47-A inclusive to see whether or not there is a change, in view of the rentals.

THE COURT: Okay.

A (After examining) It is going to take a little time for me to go through these because there are three or four jobs involved, and different rates on each one, and we have difrernt rates on each of the three jobs that I testified to, so I will have to separate the rates for each job.

THE COURT: How long will that take you?

THE WITNESS: Oh, just about five or ten minutes.

THE COURT: Five or ten minutes?

THE WITNESS: Yes.

THE COURT: Do you have any more character witnesses or other brief witnesses?

MR. ROSENTHAL: I do not have anyone here.

THE COURT: Mr. Brill?

MR. BRILL: No, sir, I haven't.

THE COURT: Well, I will give the jury a ten-minute recess.

(Whereupon, the jury left the courtroom.)

MR. BRILL: Your Honor, I am obliged at this time, in view of your Honor's characterization in the presence of the jury, and now in the absence of the jury to respectfully move for the withdrawal of a juror and the declaration of a mistrial.

MR. ROSENTHAL: I join in that application.

THE COURT: Denied.

MR. BRILL: I ask your Honor to instruct the jury to disregard the remarks that your Honor made characterizing the five designated truckers about whom there has been negative evidence throughout this case.

MR.SILVERMAN: I would like to be heard. I do not believe the Court characterized the five truckers. I believe the Court commented that the issue in the case was the existence of the truckers, which is the issue in the case.

MR. BRILL: Well, that is the characterization I refer to.

THE COURT: Yes, I believe it to be correct. If it is not correct then I will simply report to you and to the 17th floor that I do not know what I have been listening to for almost nine days, but, in any event, all your applications are denied.

MR. BRILL: Thank you, sir.

THE COURT: One of the alternate jurors wants to make a phone call. I am giving him permission to do that.

MR. ROSENTHAL: Might Mr. Denti go to the washroom during this period?

THE COURT: Yes.

I am going to ask Mr. O'Connell to stick right here and make his computations and let the clerk know immediately when he is through, and we will reassemble promptly.

(Short recess.)

(Jury not present.)

THE COURT: Are you almost through, Mr. O'Connell?

THE WITNESS: About halfway, your Honor.

THE COURT: You said vive minutes. It is now ten minutes.

You are not through?

THE WITNESS: No, I am not.

THE COURT: Well, please try to move it along.

THE WITNESS: Well, I am doing my best. There are different jobs here, and I am trying to separate them.

THE COURT: (To counsel) I came out because I assumed that Mr. O'Connell was about through, but he says he is only halfway through.

(Short recess.)

MR. SILVERMAN: Your Honor, these are the copies of the indictments that the Court requested. I will give them to the clerk now, and if there are changes to be made we will make them later.

THE COURT: They are Xeroxes of what counsel already have?

MR. SILVERMAN: Yes.

THE COURT: Do you gentlemen want to see them?

MR. BRILL: There is no back on them.

THE COURT: Okay. If you give them to the clerk he will pass them along and see that the jury gets them at the proper time, unless they need changes.

THE WITNESS: I am finished, your Honor. There were a large number of pages in the back that I thought were bills but I am finished now.

THE COURT: Good.

Let us get the jury back.

(Jury in the box.)

BY MR. BRILL:

Q Professor O'Connell, have you examined Exhibits 1-A through 47-A inclusive?

A Yes.

Q And have you determined the rental charges on each of those?

A The average rental charge, yes.

Q Having done that, in light of your previous testimony, are there any changes with respect to the figure which you previously gave us as to the truck rental

charge per day for the Carmel job?

A These show a slight increase. I gave you --

Q $98.66.

A Well, this shows $104.

Q $104; and how about Watson Avenue?

A Watson showed a little less -- $95.68, and I believe I gave you --

Q $96.80?

A 80 cents difference.

Q And the Johnson Avenue job?

A Johnson ran just a little bit higher. It ran $106. I gave you $102 and some cents.

Q $106.12?

A I say $106.

Q $106, and you previously gave us $102.35?

A Right.

Q Now having examined those exhibits and having given us the new figures, assume that I put to you the hypothetical question again which I put to you with respect to the required number of truck days, do you have an opinion with respect to the required number of truck days on those three jobs?

A I have an opinion as to the required number of truck days.

Q Will you tell us, please, what is that opinion?

MR. SILVERMAN: Objection.

THE COURT: Sustained.

MR. BRILL: I respectfully except.

Q Assuming again that I have put to you the hypothetical question that I did earlier, do you have an opinion as the total cost of hauling?

The question is, do you have an opinion?

A I have an opinion.

Q Will you state that opinion, please?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Sustained.

MR. BRILL: I respectfully except.

I have no further questions.

CROSS EXAMINATION

BY MR.SILVERMAN:

Q I have a few questions to ask you, sir.

Mr. O'Connell, under what name do you practice?

A Daniel J. O'Connell, consulting engineer.

Q Are you paid under that name, sir?

A Yes.

Q And how long have you been retained or had you been retained by Paterno & Sons, Inc.?

A In this job?

Q In any job.

A Oh, the first professional attention was back in 1964.

Q Is it correct, sir, that in relation to 1965 you received a total of $3,650 from the firm?

A That's about right, yes.

Q Is it accurate to state, sir, that in the year 1966 you also received payment from the firm?

A Yes, to the order of -- I don't remember exactly but somewhere between 700 and $1,000, if I can remember.

Q Is it accurate to state in the year 1967 you received money from this firm?

A Yes, definitely.

Q Is it accurate to state, sir, that in the year 1970 you also received money from this firm?

A '70?

Q Yes, sir.

A I have no recollection of that, but if you have the record, I will concede it. I have no recollection.

Q Would it refresh your recollection to say that in June 18, 1970 you received $600 from the firm of Paterno & Sons, Inc.?

A I remember receiving a check for $600, yes. I will take your word as to the date.

Q Don't take my word, Mr. O'Connell.

A Well, I have to. I have no recollection as to the date, but I do have a recollection of receiving a check for $600, yes.

Q When were you retained by Paterno & Sons, Inc. in relation to this particular job?

A About two and a half weeks ago.

Q Do you recall, sir, whether or not it was before February 6, 1974?

A It must have been a few days before that -- what day is February 6th of the week?

Q It is a Wednesday.

A Yes, it was before that -- it was the Friday before that.

Q Now, at that time, sir --

MR. BRILL: Your Honor, is any of this material to this case? Does it come within the scope of the direct? I object to it.

THE COURT: Overruled.

MR. BRILL: I respectfully except.

I move to strike the last two questions and answers.

THE COURT: Denied.

MR. BRILL: I respectfully except.

Q Mr. O'Connell, when you were asked to compute the computations that you made that you testified to already here today, were you given a definite number of sites to select or did you select the sites that you were going to make your computations on?

A No. He gave me the available records, namely --

Q Please.

A Did I choose the sites?

Q Yes.

A No, no, I was given records to examine.

Q Did you make any computations for a site called the Rockaway job?

A No.

Q Did you make any computations for a site called the Cedarhurst job?

A Yes, from a record book.

Q Did you make any computations for the Riker's Avenue job?

A What job?

Q Riker's Island, excuse me.

MR. BRILL: Your Honor, I object to this. It comes outside the scope of this indictment, and it could not possibly be relevant.

MR. SILVERMAN: I will withdraw Rikers, your Honor.

MR. BRILL: I am objecting to the entire line, your Honor. If it is to be continued I object to it as being irrelevant and immaterial.

THE COURT: I cannot rule on an entire line. He has withdrawn the last question, and when you hear the next question and you have an objection to it, make it and I will rule on it.

BY MR. SILVERMAN:

Q Mr. O'Connell, did you make any computations with regard to the Juniper job?

MR. BRILL: The what?

A Juniper?

Q Juniper job.

A No.

MR. BRILL: I object to that and move to strike the answer as not being relevant or material.

THE COURT: Mr. Silverman, will you respond to that?

MR. SILVERMAN: Yes, your Honor. This is a job that I believe was mentioned previously in the trial that was done by Paterno & Sons, Inc. during the years in question, and it relates to how much money they spent during these particular years for trucking expenses.

THE COURT: Will you explain the ground of your objection, Mr. Brill?

MR. BRILL: Yes, sir. I do not think there is any issue about the Juniper job.

THE COURT: Isn't there evidence that some of the trucking expenses of this corporation related to the Juniper job?

MR. BRILL: If there is I do not frankly recall.

THE COURT: Is there not -- well, let me put it differently, because I am not sure.

Let me ask whether there is or is not one or more invoices in the batch numbered from 1-A to 47-A, something like that --

MR. BRILL: I do not recall it, Judge, but if your Honor believes there is --

THE COURT: I do not know. I am asking.

Mr. Silverman?

MR. SILVERMAN: I am not positive, your Honor. In order not to becloud the record I will withdraw the question.

THE COURT: All right, then I will strike the answer. The jury will disregard the answer to that question.

BY MR. SILVERMAN:

Q Mr. O'Connell, in relation to these particular jobs that we finally selected as the ones that you made your computations and evaluations on, what records did you

request to Mr. Brill that you used in order to make these computations?

A Plans, specifications and any office records that were available in the absence of plans and specifications, particularly on Carmel where there were no plans -- they had disappeared.

Q Would it be relevant, sir, making your computations as to the expenses paid by the corporation for trucking expenses at those particular job sites?

A I do not understand your question. Would you repeat the question?

(Question read.)

A Oh, yes, definitely.

Q And did you ask Mr. Brill for all the records that the corporation had in relation to trucking expenses that were incurred by the corporation at those three job sites?

A Yes.

MR. BRILL: I am going to object to that. I do not think it is a relevant question, your Honor, and I object to it. It certainly does not go to anything concerning which he testified and which has been excluded by your Honor.

MR. ROSENTHAL: I submit further it is an unfair question because Mr. Silverman knows that the only thing

Professor O'Connell could use would be material that was in evidence in the case, and all --

THE COURT: Now look, if you are going to accuse counsel of asking an unfair question based on facts that you say he knows, come to the side bar and we will discuss it.

MR. ROSENTHAL: All right.

MR.SILVERMAN: Your Honor, to respond to Mr. Rosenthal, I propose to respond in front of the jury.

THE COURT: Yes. Hereafter do it at the side bar.

You may respond.

MR. SILVERMAN: These invoices were put in evidence, I believe, on the first day of the trial. Mr. O'Connell is now testifying in the third week of the trial. I believe that there were available to him to be examined if the defense sought to give them to him.

MR.ROSENTHAL: No question about that, Mr. Silverman. All of the bills for trucking -- and we do not pretend to claim that there has been marked into evidence in this courtroom in this case all of the bills for trucking received by and paid by Paterno & Sons, Inc. in respect to the three jobs or the five jobs in question.

THE COURT: Well, since the thing has come up in

a form that I would just as soon avoid, if possible, gentlemen, I will say that I perceive nothing unfair about the question. It seems to me to be proper cross examination in line of what happened on direct, and the several objections are overruled.

Please proceed.

MR. ROSENTHAL: I bow to your Honor's ruling.

BY MR. SILVERMAN:

Q Mr. O'Connell, you did request of the corporation and of Mr. Brill for any records that they had to substantiate trucking expenses, is that right?

A That was in evidence, yes.

Q Okay. Did you examine either these documents or copies of these invoices prior to coming to Court today?

A You're referring now to Government's Exhibits 1-A to 47-A?

Q Yes, sir.

A The first day I have seen them. I had an exhibit -- what was it? -- X and I and J.

Q You have never seen these before?

A Never saw them before until they were shown to me now.

Q I believe you testified -- correct me if I am wrong -- that --

MR. BRILL: I am going to object to this, if your Honor please. This is the kind of question your Honor would not permit me to ask.

THE COURT: Yes. Ask the question.

Q Mr. O'Connell, what was the total amount of excavated material that you testified to that had to be removed from the ground on these three job sites?

A Let us get it straight. Are you referring to excavated or trucked?

Q Before it ever came out of the ground, sir.

A Before it ever came out of the ground?

Q Yes, sir.

A All right, that is a good qualification -- a good definition. 141,507 cubic yards on Carmel, Watson and Johnson Avenue.

Q Sir, you testified to a 188,000 figure.

A That is right, on the bulk. In other words, the 141,000 became 188,000 when the structure of the soil was broken up during the excavation process.

Q Now, sir, didn't you also testify that the bulkage is created by 15 per cent variance -- in other words, the bulk would increase by approximately 15 per cent when removed from the ground?

A That is right, of its original ground volume --

let me start again.

The original ground volume will increase by 15 per cent when it is excavated and broken, that is correct.

Q In other words, if we had 100 cubic square foot --

A Yards.

Q Cubic yards?

A Cubic yards.

Q Cubic yards of material in the ground, it would be 115 when we dig it out of the ground?

A That is correct.

Q Isn't 15 per cent of 141,000, sir, 21,000, approximately?

A That is right, absolutely.

Q I know my figures are wrong because I am not an engineer or a mathematician but how do we get from 141 to 188 instead of 163?

A Because 25,000 yards were double-handled on the Johnson Avenue job. In other words, we took out 25,000, carried them to a stockpile or storage area; left them there for a time; then went back, filled the trucks again, brought it back to the job and dumped it in the hole; so you have 25,000 yards double-handled. So you must add to your 160,000 that you calculated 25,000 more and you will get 188,406.

Q Right, sir, but is it accurate to state that you have no personal knowledge of this double handling?

A Oh, yes, I do. The specifications show it specifically, and the plans show it specifically. The plans show a storage site, where it must be stored, and the specifications require it.

Q That is per the contract?

A That is per the contract.

Q But is it correct to state that if we take the 141,000 out of the ground --

A Yes?

Q -- and put it on the side right next to where it was taken out it would be 163,000?

A That is right, sure, no question about that.

Q Now you testified as to the size of the trucks that you estimated were used on this particular job.

A Yes.

Q Sir, how many wheels does a 10 cubic -- what do you call it?

A 10 cubic yard truck.

Q -- 10 cubic yard truck have?

A It's got 8 in the rear and 2 in the front.

Q Excuse me?

A 8 tires -- 8 wheels.

When you say "wheels" --

Q Wheels.

A -- what you really mean are the number of tires --

Q Absolutely.

A -- because the wheels are double wheels. I could say to you that there are four wheels in the back but that would be misleading. There are 8 tires -- 4 wheels and 8 tires in the back. Let us say a tire is a wheel for our purposes.

Q Let us call it a tire.

A Tires, so that we understand one another and get a true picture. 8 tires in the rear, 2 in the front -- 10 tires -- we would say a 10-wheeler truck.

Q How many tires does a 15 cubic yard truck have?

A Well, now it is one-half again. The 8 in the rear but it would be four in the front.

Q I have seen on the road -- as a matter of fact I saw one coming in this morning that had 8 wheels. Would 18 tires --

THE COURT: Yes, don't tell me what you saw this morning or any other time. Just ask questions.

Q What size cubic yard truck has 18 tires?

MR. BRILL: That is objected to.

THE COURT: On what ground?

MR. BRILL: Because there is nothing here to demonstrate or show that there was any such truck.

THE COURT: Mr. Silverman?

MR. SILVERMAN: I am trying to --

THE COURT: He is objecting on the ground that it is irrelevant. Why is it relevant?

MR. SILVERMAN: It is relevant because Mr. O'Connell made an estimate as to the size of the trucks that were used, and I want to know whether or not the size of the truck that has 18 wheels, what itscubic square footage is.

THE COURT: Yardage.

MR. SILVERMAN: Yardage is.

THE COURT: I will allow a substitute motion to strike. Let me see what happens.

A You will have to tell me the type of truck. If it was a concrete truck, that is one type of animal; whereas a dirt truck is an entirely different animal. Whereas a dirt truck is an entirely different animal.

Q I am referring to dirt trucks specifically.

A An 18 wheel? Then you are including the tractor.

Q Yes, sir.

MR. BRILL: That adds something else.

A That would be 8 and 8 --

MR. BRILL: Excuse me, that adds something else

that we haven't had in the case.

THE COURT: Okay; I will allow it subject to a motion to strike.

MR. BRILL: I respectfully except.

A That would be 8, 8 and 2.

Q Yes, sir.

A Are you sure it wasn't a trailer?

Q No, sir.

A Well, you are carrying 62,000 -- carrying the limit of 65,000 pounds, which is going to run, a 20-yard truck.

Q And what type of truck would be used to haul dirt over a distance that would be one mile?

A Any size truck you want, anything that is available.

Q Would you use the 20 --

MR. BRILL: Excuse me, this is the area concerning which I was not permitted to ask questions. This calls for a speculation, estimates on the basis of which there is nothing affirmative.

MR. SILVERMAN: I am trying to establish whether or not there was a different type truck that would be used for a one-mile run as compared to a 20-mile run.

THE COURT: Yes. But Mr. Brill raises a question why should I allow you to do that since I did not allow the

witness to give his own estimate in any event?

MR. SILVERMAN: I will withdraw it, your Honor.

THE COURT: All right.

MR. SILVERMAN: I have no further questions, your Honor.

mc

REDIRECT EXAMINATION

BY MR. BRILL:

Q In 1965 when you received $3,000, did you perform any services for that money?

A Oh, yes.

Q It wasn't a gift, was it?

A No. I'm not that lucky.

Q It wasn't in anticipation of this case, was it?

A In 1965?

Q Yes.

MR. SILVERMAN: Objection, your Honor.

A No.

I'm sorry, your Honor. I thought you had ruled.

THE COURT: Do you really want to ask him that, Mr. Brill?

MR. BRILL: I do.

THE COURT: Whether this corporation was doing something in anticipation of this case?

MR. BRILL: No, but --

THE COURT: I will sustain the objection.

MR. BRILL: I respectfully except.

Q In 1966, when you received from Paterno & Sons, Inc. a payment of from $700 to $1,000, did you perform services?

A Yes.

Q For the corporation?

A Yes.

Q That's wasn't a gift?

A No, they were professional services.

Q In 1967 Mr. Silverman said you received some money so you remember how much that was?

MR. SILVERMAN: Objection, your Honor.

THE COURT: Sustained.

MR. BRILL: I willl withdraw the question.

Q Do you remember how much received in 1967?

A I only have a recollection of a check.

Q Approximately.

A Of approximately $600. I think it was 600 some odd dollars.

Q Did you perform services for that payment?

A Oh, yes.

Q In 1970, when you received $600, did you perform services, professional services for that?

A Yes.

Q Have you been paid in order to testify in any particular way, Professor O'Connell?

A I am never paid to testify, Mr. Brill. I am under oath. I can't be paid to testify. I'm paid for my time and my knowledge, preparation, conferences with you, analysis of the job, never for testimony. I can't be.

Q Do you expect to be paid for the time and services which you render in this case?

A I have been paid prior to coming into this courtroom. No contingency in my testimony, Mr. Brill.

Q Do you mind telling the Court and jury how much you have been paid?

MR. SILVERMAN: Objection, your Honor.

THE COURT: I will allow it.

A My total bill for my services was $3,500 and I have been paid that.

MR. BRILL: Thank you.

MR. ROSENTHAL: May I ask a question, your Honor?

THE COURT: Yes.

RECROSS EXAMINATION

BY MR. ROSENTHAL:

Q Professor O'Connell, there has been a lot of talk here about cubic yards and I am certain you and the de-

fendants and Mr. Brill know what a cubic yard is, but everybody doesn't. Will you please describe it for the benefit of the jury?

A A cubic yard is a volume 3 foot wide, 3 foot high and 3 foot deep, so you get the volume by multiplying it, the width, 3, by the height, 3 feet, and then multiply again by the depth, 3, 27, so that a cubic yard contains 27 cubic feet.

MR. ROSENTHAL: Will your Honor give me just a moment?

(Pause.)

MR. ROSENTHAL: I have no other questions.

MR. BRILL: I have a few.

REDIRECT EXAMINATION (continued)

BY MR. BRILL:

Q I show you one of the photographs in Exhibit AQ1 and invite your attention to the dump truck which is portrayed there. Can you tell from examining it what its size is?

MR. SILVERMAN: Objection, your Honor, it is not proper redirect.

THE COURT: No, but I will allow it.

A Yes.

Q Can you tell us what it is, please?

A It is a 10-cubic yard truck.

Q That is the kind of truck you were talking about; is that correct, sir?

A Yes.

MR. BRILL: Your Honor said yesterday that I could pass these to the jury at some time, Exhibits AQ1 and BA. Could I do it now,please?

THE COURT: Sure.

MR. BRILL: Thank you. There are three in AQ1 and 13 in BA.

MR. SILVERMAN: I think Mr. Brill said he had no further questions.

THE COURT: Have you finished your redirect?

MR. BRILL: Yes.

THE COURT: Anything else with Mr. O'Connell?

MR. SILVERMAN: No, your Honor.

THE COURT: You are excused.

THE WITNESS: Thank you.

(Witness excused.)

MR. BRILL: I have no further witnesses, your Honor.

THE COURT: You rest?

MR. BRILL: I do.

THE COURT: Mr. Rosenthal?

MR. ROSENTHAL: I have another character witness

here, your Honor.

W I L L I A M F. M U L L E N, J R., called as a witness in behalf of the Defendant Denti, after having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENTHAL:

Q Mr. Mullen, what is your business or profession?

A Insurance broker and agent.

Q Are you associated with any firm?

A Yes, sir, I am.

Q What is the name of it?

A Clason & Lee, Inc., a division of Frank B. Hall.

Q Where are you located?

A 32 Court Street, Brooklyn.

Q Do you hold any office with that firm?

A Yes, I do.

Q What is it, sir?

A President.

Q As an insurance broker do you or your firm or have you through the years done any business with construction people and the like?

A Many. That is our specialty, sir.

Q Do you know the defendant George Denti?

A Yes, I do.

Q About how many years have you known him?

A 20 years plus. I couldn't give you the exact period.

Q Do you know other people who know George Denti?

A Yes, sir, I do.

Q Are they people that are in the construction world or the construction business?

A They would be primarily people in our office and the people from the different companies.

Q From different companies?

A Insurance companies.

Q Does your company also cover rentals, rental concerns, equipment rental concerns and the like?

A Yes, sir, we do.

Q Among the people that you know who know George Denti and whom you know, have you ever had occasion to discuss the reputation of George Denti for truthfulness or veracity and for honesty?

A Yes, I have.

Q And general moral fiber, as it were, general good citizen character?

A Yes, sir, I have.

Q Do you know what the reputation is of George Denti among the people you know who know him as to truthfulness

and veracity; do you know what his reputation is in that respect?

A It is excellent, sir.

Q Do you know what his reputation is for honesty, for honorable business dealings, shall we call it?

A Excellent.

Q What is his reputation as to general moral fiber or good citizenship, as it were?

A The same, sir, excellent.

MR. ROSENTHAL: Thank you.

MR. SILVERMAN: No questions, your Honor.

THE COURT: All right, Mr. Mullen.

(Witness excused.)

MR. ROSENTHAL: Your Honor, Mr. Silverman and I have agreed that certain questions that were propounded to George Denti before the Internal Revenue Service on July 28thand August 5th, 1971 and certain answers that were given by Mr. Denti on those dates might be read to the jury, just as he did earlier in the government's case.

MR. SILVERMAN: That is correct, your Honor.

MR. ROSENTHAL: And Mr. Silverman has been furnished with a copy of the proposed reading and we have reached an agreement as to which questions should or should not be read.

THE COURT: Go ahead.

MR. ROSENTHAL: With your Honor's permission, I will do so at this time.

This refers to the questions and answers, the questions propounded to George Denti and answers given by him on the 28th of July, 1971 before the Internal Revenue Service and I believe it is fair to state that the interrogator was a Special Agent Ayres assisted by Agent Rizzo.

Is that correct?

MR. SILVERMAN: I would just like to refer to them as questioners. That is what they are, asking questions and receiving answers.

MR. ROSENTHAL: He was the man who asked the questions.

MR .SILVERMAN: That is correct.

MR. ROSENTHAL: I didn't think the word interrogator had any bad connotation. If so, I wouldn't have usedit.

"Q376: Mr. Denti, I realize that I forgot to swear you in. Do you swear that the answers you have given have been the truth, and nothing but the truth, so help you God?

"A I do.

"Q395: Who would be involved with this particular

invoice?

"A This job at Watson Avenue watermain job was run by James O'Reilly.

"Q396: O'Reilly have any knowledge of this invoice?

"A I can't answer the question, Mr. Ayres, because I don't understand it. You have to make the question a little plainer.

"Q 397: Well, George, did O'Reilly furnish information on the job company sheet, or some kind of a slip to indicate that tis work was done?

"A Yes.

"Q398: Who contacted Catenzaro to have him come on the job, O'Reilly or someone else?

"A Could have been O'Reilly direct, or Taff Trucking, or one of our foreman, Sal Fagone, F-a-g-o-n-e, Bennie Trapani, T-r-a-p-a-n-i.

"Q480: I'm showing you a check No. 12069. Tell me the amount of the check and details on the check.

"A I was presented with a Paterno & Sons, Inc. check No. 12069, dated May 8, '68, made out to Michael Catenzaro, in the amount of $3,063.03 and signed by Michael Paterno.

"Q481: Do you know Michael Catenzaro?

"A No, sir.

"Q482: Do you know who wrote his name on the check,

I mean as payee on the face of the check?

"A The girl, the bookkeeper, either Louise Forte or Anne Altro.

"Q483: Was this check certified??

"A Yes, this check was certified.

"Q484: What's the usual procedure in certifying a check?

"A It's presented at our bank.

"Q485: Who presents it?

"A Whoever wants it certified.

"Q486: Explain the usual procedure, please.

"A The usual procedure of a check being certified -- either the payee or the payer can present it to the bank to be certified. That's the usual procedure. I mean, I've presented checks that I've had to use for bids to be certified.

"Q487: Did you, by any chance, present that check to be certified?

"A No, sir, no reason for me to present this check to be certified.

"Q491: Who is Sam Laspina?

"A Samuel Laspina, L-a-s-p-i-n-a.

"Q492: His address?

"A He's in the Bronx. I don't know his address.

He's another truckman whom we have used as a central clearing office. I guess -- we would order trucks through him and he would get them for us, how many we needed, two, three, four, five, whatever amount, so as to eliminate the process of having to call 12 different truckmen when we were looking for 12 trucks.

"Q529: Were all Catenzaro's invoices, as well as the Aurrichio invoices for rental expenses or equipment expenses?

"A Yes.

"Q538: You know? It's not John?

"A Yes, there's a firm in Queens by the name of Aurrichio and Tuccella. I think they're located in College Point of Whitestone -- Sonny Aurrichio and Jack Tuccella, I know.

"Q 539: Do you know whether they have done, these parties that are located at College Point, did they do work for Paterno?

"A Years ago they did work for us in rental of equipment, but we were billed under the name of Aurrichio and Tuccella, and I understand that they go under the name of A&T Excavating, I think .

"Q540: Did they have anything to do with that Aurrichio invoice or Tuccella?

mcbr

"A Not to my knowledge. I'm only answering the original question, your original question as to whether I knew an Aurrichio or Tuccella?

"Q541: Mr. Denti, requested that the interview be terminated because of the time element, and that it is hereby agreed that we will continue tomorrow morning at 10 o'clock..

"Anything elseyou wish to say, Mr. Denti?

"A No."

I amnow reading from excerpts of the questions and answers given by George Denti before the Internal Revenue Service on August 5, 1971:

"Q11: What is it?

"A It's a Paterno & Sons, Inc. chek dated June 22, 1965, No. 6847, paid to the order of Arthur Lazravitch, L-a-z-r-a-v-i-t-c-h, in the amount of $1,640.

"Q16: Was this check endorsed on the reverse side?

"A Yes, sir, endorsed by Arthur Lazravitch.

"Q17: Do you recognize this signature?

"A As being Arthur Lazravitch?

"Q18: Yes.

"A I don't know Arthur Lazravitch's signature.

"Q 26: Do you know who cashed this check?

mcbr

"A No, sir. Excuse me. Do I know the individual that cashed the check?

"Q27: Yes.

"A I do not know Arthur Lazravitch.

"Q28 Do you know anyone else who may have cashed this check?

"A No, sir.

"Q29: Do you know or have you any knowledge of anyone who obtained the proceeds from that check?

"A No, sir.

"Q 160: You know Arthur Lazravitch?

"A No, sir.

"Q161: You know anyone who may have received the proceeds of that check?

"A We paid the check to Arthur Lazravitch, Mr. Ayres.

"Q162: Doyou know anyone else, other than Arthur Lazravitch, who may have received the proceeds of that check?

"A No, sir.

"Q203: Can you tell me anything about Arthur Lazravitch?

"A In what respect, Mr. Ayres?

"Q204: What does he do? Does he own any trucks?

"A I know Mr. Lazravitch to be a truckman because

of the business we have had with him.

"I mean -- I'm trying to be helpful. Gerry. Arthur Lazravitch could be sitting in that corner" -- (pointing to the corner) -- "or any many may walk in and say hello to me; I may hace seen him a dozen times in my life, and I say hello to him; he may be Arthur Lazravitch, but I don't know him to be Arthur Lazravitch.

"Q205: In other words, you don't know Arthur Lazravitch?

"A No.

"Q206: You don't know anything about Arthur Lazravitch personally,do you?

"A No.

"Q219: I'm showing you check No. 10503. Can you identify it, please?

"(Witness looks at aforementioned document.)

"A It's a Paterno & Sons, Inc. check No. 10503, dated June 13, 1967, paid to the order of Anthony Ferrotta, in the amount of $3,960.60, and the check was signed by Michael Paterno.

"Q221: Was it endorsed on the reverse side?

"A Yes, it was endorsed by Anthony Ferrotta.

"Q225: You know anyone who may have received the benefit of that check?

"A You mean other than Anthony Ferrotta?

"Q226: That's right.

"A No, sir.

"Q228: I'm showing you check No. 968. Can you identify this, please?

"(Witness looks at aforementioned document.)

"A This is a Paterno & Sons, Inc. check No. 968, dated November 4, 1968, paid to the order of Anthony Ferrotta in the amount of $3,134 and the check was signed by Michael Paterno.

"Q289: Was the check endorsed on the reverse side?

"A Yes.

"Q290: Who was it endorsed by?

"A There are two endorsements. The upper endorsement says Anthony Ferrotta. The lower endorsement says Vin Rao, V-i-n R-a-o.

"Q291: Do you know Vin Rao?

"A I do not.

"Q292: Did you ever have any occasions to have any transactions with Vin Rao?

"A No, sir.

"Q293: Did you ever refer anybody to go to Vin Rao?

"A For what purpose?

"Q294: For any purpose.

"A No, sir.

"Q447: Did you pay any commissions to Taff or Laspina for securing these services? In other words, did they get anything from you?

"A Not from me. If they received it the other way, I don't know."

mdrl

MR. ROSENTHAL: The defendant George Denti rests.

THE COURT: Do you have anything else, Mr. Silverman?

MR. SILVERMAN: No.

THE COURT: You rest?

MR. SILVERMAN: Just one request I would like to make after you excuse the jury.

THE COURT: I am going to give you a recess of a few minutes duration while we plan the next steps, ladies and gentlemen. We will be with you soon.

(Jury absent)

MR. SILVERMAN: I would like to bring to the Court's attention one matter. I believe it was in the first or second day of the trial Mr. Rosenthal made an offer of proof in relation to the fact he was going to prove that in relation to the Carmel job that equipment was to be shared between Paterno & Sons, Inc. and two companies, one by the name of F&F or Frederico and the other by the name of Balport. I believe there has been no evidence produced by the defense in relation to any of these people and ask that any questions or answers that were asked in response to that offer of proof be stricken.

MR. ROSENTHAL: It's my recollection, your

Honor, and I may have erred in that I may not have identified the companies. But it's my recollection that cross-examination of James O'Reilly did develop that there were two other jobs being performed at Carmel at the same time as the sewer treatment plant job was, and that there -as interchange of equipment between Paterno and the contractors doing the other two jobs.

My recollection very frankly is that I don't think it was brought out -- was it Belport?

MR. SILVERMAN: Balport.

MR. ROSENTHAL: Balport and F&F or Frederico. But it was pointed out there were two other jobs being conducted at the same time as the sewer treatment plant.

THE COURT: I certainly can't remember these lines of testimony. Mr. Silverman, you will have to find what you are talking about and pinpoint it. Mr. Rosenthal, you will have to find what you are talking about and with the concrete materials before me I will make whatever ruling is proper.

MR. SILVERMAN: Just a housekeeping matter.

THE COURT: I can't do housekeeping without knowing where the house is. How long are you going to need for summation, Mr. Brill?

rdr3

MR. BRILL: I think an hour should be sufficient.

THE COURT: I should think it should be sufficient.

Mr. Rosenthal?

MR. ROSENTHAL: I might need a little longer.

THE COURT: Why? Do you have less evidence?

MR. ROSENTHAL: I think most of the weight has been thrown on to my client. I think I need an hour and a half.

MR. SILVERMAN: Is it the intention of the Court to have the government sum up today?

THE COURT: My intention is perhaps you will all sum up today. First answer my question and then I will figure out where I go.

MR. SILVERMAN: I would say an hour and a half as a ballpark figure.

THE COURT: What does that mean, not more? I want a maximum.

MR. SILVERMAN: Maximum two hours, minimum one hour.

MR. BRILL: Just to be safe, Judge, I don't think I will exceed an hour, but I might buy ten or

fifteen minutes beyond that. I will try to limit myself to an hour.

MR. ROSENTHAL: I try to give what I honestly believe is the absolute minimum that I will take. I hope I can keep it down.

THE COURT: What is your pleasure about the arrangements for summing up and charging?

MR. SILVERMAN: If I may request the government sum up tomorrow, in view of the fact that the last matter of business on yesterday, the Court asked the defendants on how much longer the case would run. It was my understanding it would run a minimum of at least one more day and possibly longer.

Based upon that, your Honor, last night I spent my time doing other material in reference to the witness that would be on the stand and not preparing the summation.

MR. BRILL: I didn't prepare a summation, Judge, I was working until late last night with Mr. Rosenthal.

THE COURT: On what?

MR. BRILL: On what we expected to be able to do. I must say to you my plans were changed as a result of your Honor's rulings. I terminated earlier

than I thought I would. Thus I could not prepare a summation.

THE COURT: We are not going to waste the afternoon.

MR. BRILL: I am agreeable to that. I think we should all sum up the same day. I think that is customary and I assume your Honor would charge tomorrow.

MR. SILVERMAN: May I be heard?

THE COURT: Just a second. We can't sum up the same day unless you are ready to sum up in about ten minutes.

MR. BRILL: I will follow Mr. Rosenthal.

THE COURT: Mr. Rosenthal?

MR. ROSENTHAL: If we could take an early lunch and recess, I am partly ready, partly not. I anticipated this and was up at 5:30 this morning trying to block out something, Judge. We worked till after 10 last night together attempting to prepare the hypothetical and the like in exploring what we needed to satisfy the Court's expressed desires.

MR. SILVERMAN: From what the witness testified to and the questions asked of this witness, and in view of the Court's rulings yesterday, I believe the defendants were fully aware that unless the Court

was going to radically change its position, as it would have had to do from yesterday, in order for them to continue with their defense, they knew well, in fact when they walked into this courtroom the questions they were going to be asking were going to be overruled or sustained against them.

In view of that they well knew they would be summing up today if that witness did not continue to testify. I believe they misled the government by saying they would be continuing later on into the week.

THE COURT: I must say I was not given clear guidance.

MR. BRILL: No, that is true.

THE COURT: There was no reason not to give me clear guidance. You knew full well what was going to happen with Mr. O'Connell, right or wrong; nothing came to you as a surprise. I deeply regret when I ask you for an estimate of the amount of time necessary you give me an estimate that is so far removed from your fair anticipation that wee face a situation of this kind.

In response to that I am going to have you both sum up this afternoon. I am going to have Mr. Silverman sum up in the morning and I will charge thereafter.

MR. BRILL. Had I known that, as your Honor had stated, I would have spent the time much more profitably preparing for my summation rather than working on plans to continue further with the defense.

THE COURT: It is 10 to 12. I will give you to 2:15 to get your summation, so there is no problem about that. I am going to rule on your requests in five or ten minutes. I am going to get the jury in now and give them a long lunch hour.

(Pause)

THE COURT: Let's have the jury in and give them a long lunch.

MR. BRILL: With respect to Exhibit BA, your Honor, it did not get to the back row of the jury. It rested in the lap of juror No. 6 at the time the request was declared.

THE COURT: If any of them want to see the rest I will certainly let them do that.

(Jury present)

THE COURT: Mr. Brill is handing into the jury box Exhibit BA, a set of photographs which I understand had not made their way all the way through the jury box. Will those of you who have not seen them please look at them while I tell youwhere we stand and where we are

heading.

As you heard before your recess, all the parties have rested. That means you have now heard all the evidence that you will hear in this case. What remains is for counsel for each of the three parties to sum up, that is to argue to you what they respectively claimed you should find as facts from the evidence that has been placed before you.

After that, it is my job to instruct you on the rules of law that govern this case and will govern your deliberations.

And then the critical ultimate stage for the jury to retire and seek a verdict.

The schedule for those things requires particularly that counsel have some time to prepare their closing arguments. In light of that we are going to give you an extra long lunch hour which will end at 2:15.

This afternoon we will hear summations from both defense counsel, Mr. Rosenthal and Mr. Brill, in that order as I am informed. Tomorrow morning Mr. Silverman will sum up and after that I will read you the instructions about which I told you.

So that we would anticipate that by lunch time tomorrow the case will be given to you for decision.

That is the program. I think at this point we ought to let those photographs finish their journey through the jury box. When that is done you may be excused for this extended lunch hour, after which I will ask you to come back as usual at 2:15 for the commencement of the summations.

I think we just ought to relax while you look at the pictures.

Will you let us know when you are through.

(Pause)

THE COURT: I guess we can excuse you, ladies and gentlemen. Please come back at 2:15.

(Jury absent)

MR. BRILL: During the course of O'Connell's testimony you said you would entertain a motion to strike the evidence with respect to the 20 cubic foot truck that had 18 wheels or so. I now make that motion, your Honor.

THE COURT: Do you want to be heard, Mr. Silverman?

MR. SILVERMAN: I believe I withdrew the question.

THE COURT: No problem. If there is anything in the case it is stricken.

MR. BRILL: Thank you.

THE COURT: Let me rule on your requests, gentlemen. I will start with the government's. If I grant your adversary's request, in any case where you think it is a big mistake, please let me know. I am going to follow what I take to be the proposed order in the government's requests and do the conspiracy count last. I think it is easier and more intelligible.

Do the defendants desire the usual charge for their failure to take the stand?

MR. BRILL: Yes.

MR. ROSENTHAL: Yes, your Honor.

THE COURT: Okay.

Government No. 1 is granted substantially. I don't know if I will read every bit of it. I will read most of it.

No. 2 is granted in substance.

No. 3 is granted in substance.

Also No. 4.

Also No. 5.

I will give the substance of the two statutes at least.

No. 6 is granted.

No. 7 is granted in substance.

What exhibit numbers do you want me to put in there?

MR. SILVERMAN: What is he title of No. 7?

THE COURT: First element under income tax evasion, the second full paragraph refers to exhibits blank.

MR. SILVERMAN: That is I believe Exhibit 165.

THE COURT: That's all?

Okay. Exhibit 165.

No. 8 is granted substantially in full.

No. 9 is granted in substance.

Likewise No. 10.

Also No. 11.

Also No. 12.

Also No. 13.

14 also granted in substance.

15 is granted.

16 is granted in substance.

17 I have some doubt about. Is that really in issue?

MR. SILVERMAN: What is the title?

THE COURT: Delegation and preparation.

I think I am going to ask the defenants

whether they desire that charge. If they do, I will give it, because I assume that meansthere will be some argument about delegation. If they do not, I don't see it's necessary.

MR. SILVERMAN: I don't see it is necessary at this point, your Honor.

THE COURT: Mr. Brill?

MR. BRILL: Would your Honor give me just a second to recheck this. I don't think it's applicable here, Judge.

THE COURT: I don't either. I take it there is going to be no argument that the preparation was delegating that if there were any mistakes they were somebody else's.

MR. BRILL: No, sir.

THE COURT: I didn't think so. I assume you have withdrawn, Mr. Silverman.

MR. SILVERMAN: Yes, your Honor.

THE COURT: No. 18 is denied. With all deference to its source, it seems to me a little bit heavy.

19 is granted in substance.

20 is granted in substance except for the business about the old addage, which I don't usually give.

21 is granted in substance. The date of the indictment is May 3?

MR. SILVERMAN: Yes, sir.

MR. BRILL: Yes, sir.

THE COURT: 21 seems to me to be inapposite about the duration.

Do you need it, Mr. Silverman?

MR. SILVERMAN: Withdrawn.

THE COURT: I will mark it withdrawn.

22 is granted in substance.

23, the first page of it is denied.

MR. SILVERMAN: We are now in membership -- is that the title?

THE COURT: Conspiracy dash. Let me suggest you numbervours in the future. Major and minor parts I don't think has much to do with this case. There are parts of 23 that I will grant.

24, that is granted in substance.

25 is denied, liability for acts and statements of co-conspirators.

26, the Pinkerton theory seems to me to be of no consequence. It is denied.

27 doesn't seem to me to be necessary regarding the summary of witness. Do the defendants

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want it?

MR. BRILL: We are not asking for it, Judge.

THE COURT: I think we will leave it out.

28 is now inapposite.

29 is granted in substance except for the very last paragraph on page 2, whether the defendant may have misled anybody about his character. But I won't give you that.

I assume there is not going to be any argument in this lengthy case about uncalled witnesses. If there is, let me know about it now. Does either side plan to argue that?

MR. ROSENTHAL: No.

MR. SILVERMAN: The government doesn't.

THE COURT: Then No. 30 is not necessary and I will deny it.

31 possible punishment is denied.

32 all that list of things is granted in substance except "B," circumstantial evidence, which I don't find of any utility to a jury generally. I don't think it's useful or necessary in this case. I won't give it.

Mr. Brill's requests --

mdr15

MR. BRILL: Would you want us to express a view with respect to the rulings made concerning these requests?

THE COURT: I would ask you to do it as I went along.

MR. BRILL: I didn't mean to interrupt. The only one really with which I have any serious question, I think, deals with request No. 11. That is one which your Honor said your Honor would grant in substance. Beginning with the third line at the end of it there is a sentence which reads "Intent to evade taxes is not an element of a crime charged."

This deals with a false statement, the last four counts, whatever the number was, 69 I think, inclusive.

I think in that context that might be misleading. I think that sentence doesn't belong there.

THE COURT: If I took out that sentence do you have any other problem about this No. 11?

MR. BRILL: No, because I think your Honor will undoubtedly charge the required elements of knowledge andintent.

THE COURT: Mr. Silverman has it in his next request, No. 12.

mdr16

MR. BRILL: Yes, that is why I say I have no problem with it in view of that.

THE COURT: I think I will delete that sentence.

MR. BRILL: Thank you.

THE COURT: Anything else, gentlemen?

All right. Mr. Brill's request, No. 1 is granted in substance.

Let me say, gentlemen, when I tell you I am granting something in substance I may grant substantially the whole thing, your words or something very close to it. It is possible that the changes will appear to you to deviate from the promised of granting in substance. If that happens I apologize in advance and assure you it's unintentional, but these are the best kinds of guidance I can give you on that.

Therefore obviously all of you are free to take exception to things that you had been led to believe I was granting, where you conclude that I failed you in that respect.

Do you understand?

MR. SILVERMAN: Yes.

MR. BRILL: I think so. In other words, to withhold any exceptions until the end of the charge.

THE COURT: Well, yes, that, of course. In addition what I am saying is that I sometimes feel that a lawyer may be misled when the judge says he is granting something in substance and he thinks he is only changing some words that don't make a big difference, a lawyer feels it changes the substance. There is room for thatkind of honest disagreement. I am simply inviting you to be sure to express it because I don't want to mislead you.

No. 2 is granted in substance.

No. 3 is granted in substance but not the last five lines, which are denied.

No. 4, which is rather lyrical for my monotonous voice, is denied.

No. 5 is denied. I think the last three lines of it are actually legally erroneous, but I don't think that helps the jury.

6 is granted in substance.

7 is granted in substance. I am not going to use the sentence that begins at the bottom of the first page, but the substance will be in there. I think that that, as it is phrased, is likely to mislead the jury. I realize the word "merely" is in there, but it's a very heavy sentence. I think the substance of that

idea and the necessity for finding all the essential elements will be in the charge.

No. 8 is granted in substance.

9 is granted in substance.

Also 10.

Also 11, leaving out the black card and leaving out the second full sentence on the second page. But the substance will be in.

12 is denied.

13 is granted in substance.

14 is denied.

15 is granted in substance except for the sentence about drawing inference. I don't know what it means and I think some jurors may not know what it means.

16 is denied.

17 is denied as it was in the government's requests.

18 is granted in substance.

Also 19.

Also 20.

And the supplemental request given to me by Mr. Brill --

MR. BRILL: I am going to withdraw A and

C in view of your Honor's rulings.

THE COURT: A is withdrawn?

MR. BRILL: Yes, sir. In view of the evidence in the case and your Honor's rulings with respect to the offer of proof, I don't think I have an alternative. I would urge your Honor to reconsider supplemental B and D.

THE COURT: All right, I will grant B in substance as part of a brief marshalling that I want to talk to you about.

When you join in that request, Mr. Rosenthal, as I take it you do, you have in mind such things as the testimony you just read to the jury. Mr. Denti swore that the payments to people like Catenzaro were for trucking expenses, as I heard the reading.

MR. ROSENTHAL: I do join in it, Judge.

THE COURT: And C is withdrawn.

MR. BRILL: Perhaps I spoke too quickly, Judge. I am going to withdraw my withdrawal of supplemental C if your Honor will permit. Mr. Rosenthal just said to me he thought that is what we are talking about.

THE COURT: I take it that supplemental request C fairly reflects contentions that you mean to

place before the jury, is that right?

MR. BRILL: I think so, sir.

THE COURT: All right, I will grant it in that light as reflecting your contentions and I will give them the substance of that.

MR. BRILL: Would your Honor please reconsider supplemental D?

THE COURT: All right, I think that ought to be granted, at least in substance.

MR. SILVERMAN: The only problem with those is it becomes redundant.

THE COURT: I will try to marshal them. I will put B, C and D in here.

MR. SILVERMAN: The only problem I have, your Honor, is with B like in boy. If, as I believe, the jury concludes that these five truckers did not exist, then it's a conclusion that the payments were not made to these people.

THE COURT: Yes, but the defense is going to contend whether made to these people ornot, these payments were made or the jury may not find beyond a reasonable doubt that they were not made for trucking services.

[illegible] trucking expenses.

MR. SILVERMAN: There is no evidence they

have been paid to anyone else. The ones the jury concludes that these people did not exist, they must form the conclusion that these expenses which were part of the equipment rental expenses listed on the return were for expenses not incurred by the corporation.

THE COURT: I think they must too. You are talking about a matter of fact, not a matter of law. I think it's a jury question. I am going to let the defendants argue that though they have -- I must say I have trouble with this argument -- a book full of invoices in these five names, a book full of checks in these five names, thick corporate records in these five names, the jury should find that maybe they paid all this money to some other people.

And the strain on credulity of that kind of position which these defendants choose to present to this jury, has caused me great difficulty throughout. I have concluded that it is the jury's credulity that must be tested and not mine. So I am going to let that question go to the jury. Perhaps we will just seewhat happens.

So that is where I come out on that, Mr. [illegible]. Judith, I am not positive of the correctness of that position, but we have been over it quite enough

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and I guess we have to live at this point with whatever error is entailed in that determination.

MR. BRILL: Does your Honor have my supplemental E, which I submitted with your Honor's permission, belatedly, this morning?

THE COURT: It will be embraced within the government's requests that I have already granted so I guess it is granted in substance, though it is incomplete. And the charge on this subject will look more like the government's request than like yours. I think our expert left some machinery here which was needed for his adjustments and maybe you want it back.

(Handing to Mr. Brill)

MR. BRILL: Thank you.

Let me just bother you with one other thing, and then I think we will be through.

As reflected in some of the defendants' requests, and notwithstanding some motions to strike and to withdraw a juror and so on -- I have in mind, for example, defendants' request No. 11 -- it seems to me to be at the heart of this case, if not dispositive -- and I agree it is not in itself dispositive -- whether these five truckers existed -- that is at least the heart of the government's accusations against these defendants.

I do not intend in general to marshal the evidence.

Does anybody wish me to do that?

Mr. Brill?

MR. BRILL: No, your Honor.

THE COURT: Mr. Rosenthal?

MR. ROSENTHAL: No.

MR. BRILL: My understanding, from my experience with your Honor, is that your Honor does not marshal the evidence.

THE COURT: All right, I do not intend in general to marshal the evidence. I intend to focus the jury on this key question because I agree that the defendants, concerned about the possibility of confusion, may have some basis, although I do not think it would be generated by the

government's evidence. In doing that I do not mean to summarize completely all the evidence on either side.

I am troubled by the fact, as I am usually troubled whenever I try to define an issue for the jury, where the evidence looks to me to be very one-sided, that in identifying the points and countervailing points we must avoid seeming to attach excessive weight to the government's case. I mean to touch very briefly on the evidence of invoices that are claimed to be false, and checks that are claimed to have been made to fictitious payees, false addresses; the absence of records of the existence of any of these people in such places as the Motor Vehicle Bureau and the Insurance Departments; the endorsements by Denti and the procedure of signing checks by Paterno. I think I will leave it at that. I think there is much more that Mr. Silverman will want to talk about in the summation, but I do not think I will talk about it in defining the problems for the jury.

On the other hand, I want the assistance of the defendants in making this as fair as possible.

As I understand the position of the defendants, it is roughly as follows:

First, that the non-existence, the fictiousness of these truckers has not been proved beyond a reasonable

doubt, and that the jury should not deem itself persuaded of that.

Secondly, even if the five named people or concerns were non-existent, the defendants here -- the individual defendants did not know or believe they were non-existent, and in good faith thought they were being paid for trucking expenses;

And, third, even if the five were non-existent, the government has not proved beyond a reasonable doubt that the amounts in question in the indictment were not in fact paid to somebody for trucking expenses.

Now my question is, does that 3-point summary in some way do insufficient justice to the defendants' case, and if so what would you wish me to add?

Mr. Brill?

MR. BRILL: I think encompassed in what your Honor has said there is also the element of intent, the specific element of intent required with respect to each of these offenses, and if it isn't then I would respectfully ask your Honor to encompass it.

THE COURT: Okay.

Anything else?

MR. [illegible]: I believe that what your Honor outlined and Mr. Brill's addition cover the position of

the defendants as contended.

THE COURT: All right.

If I get out of your way you can all prepare for your summations, and we will reconvene at 2:15.

MR. BRILL: Would your Honor want to hear motions?

THE COURT: Yes, but I suggest you be brief.

MR. BRILL: I will be, sir.

THE COURT: In your own interests?

MR. BRILL: Yes. First, your Honor, I want to renew all of the motions made at the end of the direct case of the government as though I made each one seriatim with respect to each of the matters referred to in those motions. However, at the end of the whole case I add that I now ask for judgment of acquittal.

I would like to add also that in connection with the prosecution's position that five checks specifically, concerning which Mr. Oberg addressed his testimony to, purportedly endorsed by Mr. Denti, were not connected to Mr. Paterno, and I think your Honor took that evidence excluding Mr. Paterno from it -- that is my recollection of it.

I make that statement preliminarily because --

THE COURT: Did I? If so -- you mean the evidence

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of whose handwriting --

MR. BRILL: On the back of the check.

THE COURT: Well, I don't know why I should have done that.

Do you?

MR. BRILL: Yes, because I think that was a correct ruling.

THE COURT: Correct on what ground? It was done during the course of and in furtherance of the alleged conspiracy. You mean it should be excluded as against Mr. Paterno?

MR. BRILL: Yes.

THE COURT: If I did do that I now wish to change the ruling. It sounds completely erroneous.

Mr. Silverman?

MR. SILVERMAN: The only evidence about that was the statements made by Mr. Denti to IRS.

THE COURT: I would hope that is what I did because that is what I should have done. In any event, having been reminded by you of this, which I hope I did not do to begin with, Mr. Brill, if I did do it I now correct it, and there is no such limitation on that evidence.

MR. BRILL: All right. I would like to argue with your Honor for just a minute, because although I know I am

using my own time, I have a gigantic job to do between now and the time when we are going to sum up this afternoon.

I do not believe under this indictment a conviction could stand merely because the government has shown there were payments by check which were cashed in the places which the evidence describes.

I respectfully suggest that the government has failed to prove that the substantial amounts of money a alleged in the indictment were fraudulently deducted by the defendants, inasmuch as there is no sufficient connection between the remaining checks, other than those identified or testified to by Mr. Oberg and the defendants.

If you were to take at face value the government's evidence at its best, all that they have shown is that those amounts reflected in those five checks may have been improperly deducted from the income tax returns in question. That I think comes within the scope of what your Honor said with respect to request No. 8, that your Honor would grant in substance, that there must be -- in the paragraph marked first, in request No. 8 -- and that, of course, follows the allegation of the indictment in which it is stated that the defendants attempted to evade and caused to be evaded a large portion of the corporate income tax due -- and I don't believe that with respect to those five

checks, if that is what it finally comes down to, I think if that is the best that the government has, that that constitutes within the meaning of the law "a large portion of the corporate income tax due".

THE COURT: Your motions are all denied.

MR. BRILL: I beg your Honor's pardon?

THE COURT: Your motion's are all denied.

MR. BRILL: I respectfully except.

THE COURT: Could you tell me, just between us old fellows, Mr. Brill, why you state -- please explain to me on the record, because one of these days I am going to be upset about this -- why you persist in the archaic business of "respectfully excepting" in the face of an adverse ruling which is now on the record.

MR. BRILL: Judge, that is just a habit which I have been trying very hard to overcome. Your Honor was kind to include me in your age category, but I am probably a generation older, and in the early days when I came to the bar, one of the first things that one was taught that when there was an adverse ruling on which you had a different point of view -- concerning which you had a different point of view, you could only save it by saying "I respectfully except."

Your Honor knows that I still use that phrase,

although other lawyers have other phrases, and it is not intended in any way to be disrespectful to the Court. It is just -- I think I once said to your Honor it is pretty hard to teach an old dog new tricks. Your Honor asked me that question once before.

THE COURT: Well, perhaps you did but it is a source of some chagrin to me that a man with your agility and flexibility and all other noticeable respects should be incapable of adopting this.

I no longer say "23 skidoo!" myself. It seems to me if a rule has been changed for a generation or two we could sort of ease in and follow it. I urge you to try.

MR. BRILL: I will try, sir.

MR. ROSENTHAL: Judge, I think it is pirmarily principally a reflex. I know I find myself doing the same thing -- I learned it about the same time as Mr. Brill.

THE COURT: I understand but I think you should both try to control that.

Now we have pending a motion to strike. It seems to me to be one of the lesser important concerns.

Mr. Silverman raised it. When we get back here -- [illegible] 2:10 if you want a ruling on it, and I will ask you to give me the materials and

I will rule on it.

I assume there is no problem about this but I mention that it is entirely permissible when you feel the occasion justifies it to stand up and object in the course of an adversary's summation. I mention that particularly because a couple of Assistant United States Attorneys recently -- I will not assume you will do this, Mr. Silverman -- have stood up and said "Look how courteous I was. I did not object during the defendant's summation, and I expect the same kind of gracious treatment."

Don't do that. Everybody is allowed to object. Obviously, responsible lawyers like you are not going to be jumping up and down when your adversary is summing up, unless you need to. If you need to get up and say so. Please don't say the first person pronoun things which our Circuit has gotten upset about. Don't say "I think" and "I believe" and so on, because if you do I think I will stop you, since I have been writing so many opinions about it. Otherwise I will try to leave you alone.

So let us reconvene at 2:10 just in case we have some unfinished business.

MR. SILVERMAN: Yes, your honor.

THE COURT: All right.

THE CLERK: Court stands in recess until 2:10 p.m.

(Luncheon recess.)

AFTERNOON SESSION

2:10 p.m.

(In open court; jury not present.)

THE COURT: You have a motion?

MR. SILVERMAN: Yes, your Honor. With respect to page 451, your Honor, which is the volume to your right --

THE COURT: Yes?

MR. SILVERMAN: -- there are certain representations made on that page as to equipment shared by Balport and I believe F&F. The government does not wish to becloud the issues and bring this to the jury's attention.

The only reason I would like to bring it up at this time, your Honor, is to prevent the defendants from relying on any of those statements or any of those answers that were made on that page and the subsequent page that referred to those two companies, because there has not been any evidence produced as to the equipment that was shared or not between Balport, F&F and Paterno & Sons.

THE COURT: Yes, Mr. Rosenthal?

MR. ROSENTHAL: Your Honor, I call Mr. Silverman's attention to pages 1291, I think, and 1292 of the transcript, and the companies in question were named specifically. If your Honor wants me to read it to you I will read it into

the record -- I will be happy to do so.

THE COURT: Let me see -- I am having trouble finding my copy.

MR. ROSENTHAL: Well, may I read it, Judge. It is a part of the transcript of February 15th.

THE COURT: No, I don't have it.

Did anybody borrow my copy?

Let me see yours, Mr. Rosenthal?

MR. ROSENTHAL: Certainly (handing) -- starting with line 10 on page 1291.

THE COURT: (After examining) What about it? There is no way of telling -- the closest he gets is he doesn't think so -- "it might have".

MR. ROSENTHAL: It is my recollection that he says there that there was --

THE COURT: Let us not guess. I have just read it, because you have loaned it to me. You see what it says (handing).

MR. ROSENTHAL: (After examining) He says "I don't recall specifically" --

THE COURT: That's right.

MR. ROSENTHAL:-- "but it might have."

THE COURT: Yes.

MR. ROSENTHAL: "-- We would switch a lot of stuff

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around. Then at the end of the day they just added it up and who was belonged to who I do not know."

THE COURT: Do you claim that that is evidence of transferring back and forth of trucks between Paterno on the one hand and Frederico on the other hand?

MR. ROSENTHAL: What was the original question, your Honor, that -- I think the original question was about interchange of equipment, as I recall it. I was looking for it but I did not want to rattle the papers I have here.

THE COURT: Well, that page 452 -- this case has been about truck rentals, not about backhoes or fronthoes and cranes.

The question on page 452 focuses on trucks, which is not astonishing. That is what we have been here for two weeks, so I do not know what "other equipment is going to do about this subject, or why you think it will help you.

Well, I do not want to keep the jury waiting any longer, Mr. Rosenthal. I have read it to my satisfaction.

MR. ROSENTHAL: I think that my represention was correct on Mr. O'Reilly's testimony.

THE COURT: All right, I am going to rule that if you mean to rely on the testimony, to the pages to which

you have referred, to show interchange of trucks between Paterno on the one hand and these two companies on the other, I will not allow it.

MR. ROSENTHAL: No, your Honor, I never made a representation, as I recall it -- and as I read it here I said "That is relevant because of the fact that there was an interchange of equipment between the companies during that period."

THE COURT: I understand that but if that is all you are saying there is no disagreement. If you want to talk about an interchange of equipment, the relevance of which escapes me, then you go ahead and talk about it but if you are going to say and imply by "equipment" you mean trucks, then on Mr. Silverman's objection I will stop you because the record does not support you.

Is that what you intend?

MR. SILVERMAN: Yes.

THE COURT: All right, I rule in Mr. Silverman's favor.

Now let us get the jury in and proceed.

(Jury present.)

THE COURT: All right, Mr. Rosenthal.

MR. ROSENTHAL: If it please the court, Mr. Silverman, Mr. Brill and Mr. Ehrlich, Mr. Foreman and ladies and gentlemen of the jury:

Now it becomes not merely my pleasure but my duty to address you. You will recall when I made my opening statement I said there was no duty imposed upon me by law to make any statement in advance of the trial or in advance of the taking of testimony. However, under our system of law there is a duty imposed upon a defense lawyer to address the jury and to indicate the conclusions that he believes or thinks should be drawn from the evidence or the inferences that may be drawn therefrom.

You may wonder as to why Mr. Silverman was the first to address you at the time of opening, and then Mr. Brill, and I was low man on the totem pole and I was last, and why now I am first. Under the system that prevails in the State of New York, and that is where we are even though this is a federal court, the defense lawyer is the first to address the jury, and also under this system that prevails in the State of New York we go by in first order. In other words, Mr. Brill's client is named first in the indictment

and that is why he addressed you first at the time of opening, but in the closing he would be the second defense lawyer to address you, and the reason why Mr. Silverman gets the first bite out of the apple and the last bite is because the burden of proof is upon the government in this case or upon the state, if it be in the state court, and that burden never shifts, so that the prosecutor has that little or maybe big edge in that he first addresses the jury and he, last of all the attorneys, addresses the jury.

Now, we start off in considering the evidence with the presumption that the defendant George Denti, who is seated at the defense table, is presumed to be innocent. This is a very easy thing to talk about. It may be a very difficult thing to apply. But his Honor at the time he first addressed you, and I believe also at the time he interrogated you as prospective jurors, informed you and advised you that in our system of juris prudence that exists in this country and in this state a defendant is presumed to be innocent and at that presumption remains throughout the trial, throughout the address by the lawyers, throughout the charge by the court, and even throughout your deliberation, and only _ ceases to exist if at some time the 12 of you arrive at a conclusion to the contrary.

I say this is very easy to talk about. I appreciate

that it is very difficult to apply, but my recollection is that when his Honor first questioned you as prospective juors that he did mention this to you and each of you did say that you would observe and follow his instructions on the law and that you would be able to follow this proposition of law that has existed through the ages in our system of jurisprudence.

Now, this case has not been as long as we anticipated it would be, but it has been long enough, believe me. We put in a full day every day that we have been here and at the outset I want to thank each and every one of you, and I am not attempting to butter you up in any way, for your attentiveness and your patience in listening to the evidence, in retiring to the juryroom when his Honor requested it and returning and not showing in any way at all that you were being impatient. I know that it is at a great sacrifice to each and every one of you to take two or three weeks out of your lives and to spend it in a courtroom, considering the problems of complete strangers. But it is the only way it can be done and it is the only way it is done in this country and the fact that you do do that and that people like you do the same thing keeps intact our jury system.

There has been many, many witnesses and I would be remiss or I would be saying a falsehood if I were to tell

you that I recall the names of each and every witness. Mr. Brill, who is more adept than I am, has keep a running list of the witnesses and he was kind enough to furnish me with a copy of his list so that hopefully I do have before me all the witnesses that have been presented.

I won't attempt to review each and every witness, but I will try to group them in discussing their testimony with you, and the first group I start off with is what I refer to as the negative witnesses, the people that were called by the government to prove that inability to locate the five truckers that are in question. We had a stipulation in respect to, I believe, two letter carriers. We had astipulation in respect to a Mr. Fiore from the New York Telephone Company. Those stipulations were basically that if the letter carriers had been called they would have testified that they could not find the addresses that appeared upon some of the invoices that are government's exhibits 1A to 47A and Mr. Fiore, if he had been called, would have testified that the various telephone numbers that appear upon those invoices were not in fact listed to the people whose names are on the invoices.

I think he would have testified that in some instances the phone numbers didn't actually exist or at least they weren't in service at the time of the invoices. I don't

think there is any question about it.

Then we had the live testimony of a Mr. Marino and a Mr. Taglieri, both of whom are letter carriers and they told you generally about the addresses which they served and the fact that they did not know any tenant at those addresses bearing the name of one of the five truckers that are in question, I think one of whom was Aurrichio and I believe another one was Lazravitch. I am not certain of that. Your recollection of the testimony applies, anyway.

And then, and I will come back to Mr. Taglieri later because of one little remark that he made that I think is very, very significant in this case, then we had a Mr. Whitney from the Internal Revenue Service who proceeded to say that, I think, he was in charge of the Special Search Unit at Holtsville, New York, and, frankly, I don't know where Holtsville is, but, at any rate, that he had caused a search to be made or had made it personally and had not found any income tax returns in the names of the five people in question. I think he said he did find a return for one John Aurrichio, which everybody agrees is not the Aurrichio who appears among the invoices involved here, 1A through 47A or among the checks involved here.

Now, what has all of this proved? I submit to you that it proves nothing, a big fat zero, except that there

are people who never filed income tax returns and never filed a federal income tax return, and then I think he also testified concerning the highway use tax and he found no record of that, of any of the names including the John Aurrichio that he did find an income tax return for.

Then again we had another negative witness, a Mr. Burke of the Compensation Rating Board and he proved I think even less than Mr. Whitney. He agreed that self-employed people do not have to carry Workmen's Compensation, do not have to file any policies with the rate board or the rating board and he also agreed, if my memory serves me correctly, that a truck broker, in other words, a man who owned no trucks whatsoever and did not have an employee whatever, but did arrange and did arrange for others to do trucking and billed in his own name, that man would not --

MR. SILVERMAN: Your Honor, I respectfully -- I don't like to interrupt counsel, but I believe counsel is misstating what Mr. Burke had testified to. I believe or my recollection is that Mr. Burke did not know of a truck broker or what a truck broker was and that his testimony as to whether or not these truck brokers do file or don't file was excluded.

MR. ROSENTHAL: That may be, Judge, and I thought when I blocked this out in the early hours of this morning

anticipating your Honor's ruling and with reference to Mr. O'Connell's testimony that I might be called upon this afternoon to deliver a summation. I,very frankly, did not have a chance to go back to the transcript and when I have said to the jury -- and if I'm wrong, I will accept Mr. Silverman's correction. I, frankly, don't know whether I am or not. But I am not doing it intentionally and during the short period of time I have had to prepare this I have not had a chance to refer to the actual transcript, and this was what my notes in my notebook showed.

THE COURT: I see your brethren back there perhaps checking on Mr. Silverman's different recollection and in light of what you have said I suppose we ought to suggest to the jury that they take Mr. Silverman's unless Mr. Ehrlich or Mr. Brill or you can show something else.

Mr. Brill?

MR. BRILL: Your Honor, I would suggest that they rely upon their own recollections.

THE COURT: In that event, since this has been made such a big subject, I will direct counsel overnight to ascertain the fact from the record and together we will tell you what is accurate about this tomorrow morning.

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MR. ROSENTHAL: Now this presents an ideal time for me to say something that I should have said at the very outset of my summation, and that is this: If I say anything at all that does not conform to your recollection of the evidence, please disregard it because, believe me, it will not be intentional.

And I think Mr. Silverman will probably tell you the same thing, and I am reasonably certain that Mr. Brill will tell you the same thing.

One thing that causes problems to lawyers is not do we merely have the testimony but we also have other material which we read, such as statements made by witnesses, or grand jury testimony, and many times that --

THE COURT: Mr. Rosenthal, that won't help us at all.

MR. ROSENTHAL: All right.

THE COURT: The only thing the jury cares about is what evidence has been placed before them. All of us may have read other things which for one reason or another are not in evidence -- that will not help them.

MR. ROSENTHAL: No. I merely wanted to explain to them how sometimes someone may make a misstatement to the jury without truly intending to mislead them.

THE COURT: I am sure they understand that.

If there are any misstatements by anyone I think it can be fairly said that none of us is trying to mislead you, and that your recollection will control in the end.

Now let us proceed.

MR. ROSENTHAL: Now getting back to our compensation rating boardman -- and I am almost fearful to revert to his testimony in that I might be making another error, but it is my recollection, as I stand here now, that he did say that there are people who are required by law to carry workmen's compensation and don't in fact carry it. If I am wrong about that, please ignore it, but use your own good judgment of what happens.

We had a Mr. Johnson from the New York State Tax Bureau -- and again this is testimony so similar to Mr. Whitney's -- that he found no income tax returns for these five names except, I think, as to John Aurrichio. However, I think the government managed to reach a new peak in absurdity in that they had Mr. Johnson testify that he had also searched the corporate records under the names of the individuals. I don't know, your own judgment on that is what should govern.

We had a Mr. Spitalewitz of the New York Motor Vehicle Bureau who also told us that he found, I believe, no operator's or chauffeur's licenses in the names of the

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individuals involved, except possibly John Aurrichio.

Then we had further negative testimony. You see, what the government has done here, I submit to you -- and I submit you may find this to be the fact -- what the government has done here has set up straw men, and then has proceeded to bowl them over with Whitney and with Johnson and Mr. Burke and Mr. Spitalewitz, and Mr. Ciavolella who was a representative of Local 282, and Mr. Sheehan who was a representative of Local 456.

Mr. Ciavolella told us that he had found one or two similar names but not exact names in their records of Local 282 -- and I think they were all very old records, back in the '50s, if my recollection is right -- and Mr. Sheehan, I think, did find one similar name but again with a different first name.

That is my recollection, but it is your recollection that governs.

But we did get this from Mr. Sheehan -- and I think we also got it from Mr. Ciavolella -- that a man going to work as a truckdriver would have 30 days within which to join the union, and Mr. Sheehan also said that a man from another local might under certain conditions, through circumstances, work in the jurisdiction of his local.

So that again we have the negative, because if these

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five men were brokers and not truckdrivers, and if these five men could not in fact own any trucks in their own names, you would have no records either in the Motor Vehicle Bureau or in the union hals of 282 or 456, I think is the other local -- 456.

And the proof, the negative proof proves just what it sounds like -- negative, nothing. It doesn't prove that these men do exist, nor does it prove that these men do not exist.

I do not pretend to be able to tell you, as I stand here, as to whether or not they do exist or not -- and I will come back to that later because I do not think that that is the important issue in this case.

Now the second group that I blocked out are the Paterno employees or former employees.

We had an Anne Altro, and her sister, Louise Ferraro.

I think Louise preceded Anne in working for Paterno & Sons, Inc.

Anne, in her enthusiasm on the stand, told you, in response to questions by Mr. Silverman, that she was always anxious to see that the little man got paid, that the poor truckdriver got paid within a week or ten days, as soon as possible after receipt of his invoice; and

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that the big fellow could and did have to wait.

I think also she told you that sometimes it depended upon the condition of the bank balance of Paterno & Sons.

Now just for a limited purpose at that time, I showed Mrs. Altro a series of invoices and checks, all of which were prepared during the period when she was there -- in fact, I think most of the checks, except for the signatures thereon, are in her handwriting.

These were for little men, not for big men. They were bills amounting to as small, I believe, as $80 -- and all you have to do is look at the bills and you can see that they were for comparatively small people -- and when I say "small" I mean small in the business world.

These checks run anywheres, is my recollection, and you will be able to take them into the jury room with you, you will be able to look at them and compare them -- these checks, which are numbered Exhibits X-1 through, I believe, 10 -- through 10 or 11 -- through 11 -- are anywheres from four weeks to, I think, nine weeks or eight weeks from the receipt of the bill to the date of the check.

So Mrs. Altro, I am certain that she did not

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do it maliciously or intentionally to mislead you, but she was mistaken about what happened with bills.

The reason why the government had her or questioned her about this was that in some of the government's exhibits, 1-A to 47-A there are lapses of time, I think, of two months, and I think in one instance maybe even three months between the receipt of the bill and the payment of it.

And they want you to infer something sinister as a result of that. I submit to you that there is nothing sinister, that there is nothing that was not in the regular course of actions of Paterno & Sons, Inc. in their business.

Through Louise Ferraro the government got in certain records of Paterno & Sons, Inc. -- like the purchase book, and I think the cash disbursements book. There were books and records -- you have a million of them here in this case that they got into evidence as a result of Mrs. Ferraro's testimony.

Mrs. Ferraro told both you and Mr. Silverman that every invoice, before it was signed by Mike Paterno, before it was presented to him, had what she called backup slips, or if there were no backup slips that there were entries on the cost sheets of Paterno & Sons, Inc.; and that this was true of the invoices that applied to the 48 checks

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that have been marked as exhibits in that pretty black book, 1 to 48.

MR. SILVERMAN: Excuse me, Mr. Rosenthal. In view of the Court's request that if counsel does have an objection that they raise it, I would like to bring to the Court's attention that Mr. Rosenthal, I believe, is inaccurate.

The government did not put any of the books and records in throuth Mrs. Ferraro. The books and records that are in evidence were put in by the defendant as Defendants' Exhibits, excluding the books and records for the period subsequent to 2-70 which was offered by the government through a subpoena, your Honor -- not through any witness.

MR.ROSENTHAL: I see Mr.Brill's nodding that Mr. Silverman is correct, and I will accept the correction made by Mr. Silverman.

Now an interesting thing is that the 48 checks, Exhibits 1 through 48, had invoices to match each and every check, except in three instances.

I think there were three invoices missing. Now this company had moved three times during the period involved. You heard originally they were at Rowe Street when Mrs. Ferraro went to work for them. Then they moved

from Rowe Street to City Island, and that they are now in Brewster, New York.

It's a wonder, I submit, that anything was available, that there were cancelled checks and that there were all but three invoices available, and I ask you to ask yourselves, does this sound to you like the work of a company that was seeking to gyp the United States Government -- and the State of New York, too, because they get the equivalent of an income tax in what is called a franchise tax return? Would a company that was seeking to cheat, as they have charged in this indictment, and would the individuals who are working for the company, George Denti or Michael Paterno, who are charged with also seeking to cheat the United States Government from its rightful tax -- would they have kept this mass of evidence? Would they have kept these very pre-ty checks that are in lovely Eisenglass -- I do not know what it is called today but that is what it used to be called -- and as they are meticulously set forth in the book that they have prepared? Would they have kept these invoices if there was anything in their opinion wrong with the checks, if there was anything in their opinion wrong with the invoices, or would they have trusted to the chance that microfilm, which banks provide and which don't always come out just the way

you would like to have it, would thwart anybody investigating it?

And would they not have gotten rid of all this, either using moving as an excuse or just that they were lost, or misplaced, and those things do happen in small companies and in big companies, and if they had done anything of that sort, who could have proven to the contrary?

Just think about it.

Are not their actions consistent with innocence? Are not their actions in having all of this available to the order of Mr. Rizzo, who came to the company to audit the books, and giving him open sesame, as he told you himself -- was not all of this consistent with innocence? Was not all of this the thing that anybody who had done no wrong would normally do?

I think a great deal has been made of the fact that the backup slips had been cleared out of the files and that the cost sheets were eventually destroyed.

Well, if they had kept every scrap of paper -- and I can appreciate this -- some of you folks who are at business or at in offices can appreciate it -- if you attempt to keep every scrap of paper that is required or has been used in your business you would need a building

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the size of the Pentagon, if you were in business long enough, and if you did enough business. I submit that they kept the vital records, and they kept them properly, and the records will show -- and you heard him say that they turned over and gave Mr. Rizzo open sesame, to walk through their books and records, as it were.

Now another witness for the government was May Nunkin who, I believe, had worked at one time for Paterno & Sons and who was not a bookkeeper -- and I think perhaps the only pertinent part of her testimony that I can recall -- and you may be able to recall more -- the only pertinent portion of her testimony that I can recall was that she had a Wheeldex in which she had some truckers listed on, and that did not include the names of the five truckers in question.

Then there was another employee, not past but present -- Jim or James O'Reilly.

Now you saw Mr. O'Reilly on the stand. You saw and heard him. You had a chance to observe him. You noticed him, as I recall, in the blue suit which did not seem to be too comfortable to him. He's a construction site superintendent, and I don't think he was comfortable in the courtroom. This was not his cup of tea. This was not his normal area or setting. And Mr.

O'Reilly has no college degree. He's not a polished or articulate witness, but he did know the practical side of practical engineering, and the practical side of building a sewer.

And he was able to testify and did testify concerning his work; and he told you, among other things, that on job sites there were trucks with no names on the side of them -- no letters or addresses or phone numbers.

Then we come to another group -- the bank employees. The first one called, to my recollection, was Mr. Hoffmann who testified that he had okayed for cashing most or at least I think almost half of the checks that appear in that black book and that are numbered 1 to 48. And he could not recall and did not attempt to recall the appearance of the people that presented the checks.

I asked him, among other things, on cross examination as to whether or not he had conspired with George Denti and with Mike Paterno to defraud the government in respect to income taxes paid by Paterno & Sons, Inc. -- and I did not ask that out of the thin air; I asked that because of the fact that there is a file in this case, a document known as a bill of particulars which is, under legal terms, amplification of the indictment. And there is a statement in there made by the government -- not by

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the defense but by the government that Mr. Hoffmann was in fact a co-conspirator.

Now each and every one of you heard Mr. Hoffmann's testimony, and you heard the circumstances under which he okayed these checks for cash; and you heard his denial of the fact that he had ever conspired with anybody to defraud the government in respect to Paterno & Sons, Inc. income tax returns; and I submit you are in a position to judge whether that charge was fair, whether that charge against Mr. Hoffmann was proper, and what in fact did occur.

Then we had Mr. Andretta who has been a friend of George Denti's for many years -- and there is no question about it -- and he admitted it.

May I just recall to you for a moment the note that Mr. Andretta wrote to George Denti and mailed on or about the 21st of March. This is Defendants' Exhibit H in evidence. It still shows "id" in here but it is my recollection that it is in fact in evidence.

Mr. Andretta said, among other things -- asked George to come to see him on a Friday afternoon, and if it doesn't get to him to come Saturday and Sunday, and then he said:

"But do not call me" -- and he underscored that -- "I will explain when I see you again."

And then he said at the bottom, almost as a post-script, "Do not discuss this on telephone; will explain."

And when I asked him whether or not he wasn't afraid that his telephone might in fact be tapped, he said no, he wasn't afraid of that.

If you will recall, the very last thing he said, which was volunteered, he asked for the right or permission to make an explanation, that the reason now that he did put this in was because he didn't want his wife to know what was going on in respect to George Denti.

He also told you or told Mr. Brill, I believe, that while he was being interrogated by the IRS -- and I think also while he was before the grand jury, he was awaiting approval to be vice president of a bank up in Connecticut -- I think it was the Liberty National Bank -- and that approval required clearance by the Department of Justice, I believe, the Comptroller of Currency, and I think also he said the Internal Revenue Service.

Now I submit to you that you can figure out whether or not Mr. Andretta felt he was under any pressure at the time he was questioned by the Internal Revenue Service and/or the United States Attorney's office which is a branch of the Department of Justice.

Then we had a Mr. Colantino who also was a

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platform man up at the bank on 149th Street. He had approved, I think, only two or three checks and he had, as I recall it, no independent recollection of the transactions at all.

Miss or Mrs. -- I frankly do not remember which -- Muscatello and Miss or Mrs. Weisenberg, who were tellers at the bank -- they told you the routine of what went on and how before they would accept the check of any size at all it had to be approved by an officer or platform man at the bank, and that the checks in question had been approved by such a person.

Now among those checks there is one that shows an additional amount was paid -- I think 800 and some odd dollars -- and the government produced from records furnished them by Paterno & Sons, Inc. and by the individual defendants -- the government produced a check to the order of Joseph Denti in the sum of 800 and some odd dollars.

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Apparently whoever cashed the check from exhibit 1 to 48 at or about the same time cashed the Joseph Denti check and, interestingly enough, the Joseph Denti check had an approval of a bank officer as well as the check to one of the truckers.

Then there was a check, and this, I submit, goes to the good faith and the lack of consciousness of any guilt on the part of George Denti. There is a check to the order of James O'Reilly, a payroll check. I don't recall the exact amount, but I think it was $230, and apparently Jim O'Reilly had been in the office or been sent to the job and he had endorsed it and he wanted the cash and George Denti didn't merely sent it to the bank to have it cashed, but George Denti put his signature on it, George J. Denti, immediately underneath Jim O'Reilly's signature and when that check was cashed at the bank it was not okayed by an officer. They knew George Denti's signature. In fact, he was the one who signed it. I think it came out here that he had the right to sign payroll checks and it was cashed, and if my recollection serves me correctly, on that very check there is an another item indicating that there was a check for $15.50 cashed at or about the same time. Who cashed the O'Reilly check, the Joe Denti check and/or the $15.50 check, there is no proof before you whatsoever, and

you are asked to speculate and to guess that it must have been someone connected with either of these defendants or doing it for them who did that, and I submit to you that if you are going to speculate -- and you should not speculate in any case, but if you were going to speculate you could very well figure out that whoever picked up the check at the office of Paterno and Sons and went to 149 Street to cash it had at or about the same time cashed for somebody in Paterno and Sons the Jim O'Reilly check and/or the Joe Denti check, and that when they went to cash the larger check they had the bank also cash the checks that they had cashed, and it certainly does not prove that George Denti had anything to do with an improper cashing of any checks.

And then we have some checks that are cleared through Vin Rao or Vincent Rao and we had himhere as a witness and he told you in no uncertain terms that he does not know George Denti, he doesn't know Mike Paterno, and you heard me read today the questions and answers given by George Denti when he was interrogated by the Internal Revenue Service -- and I will come back tb this a little later -- but in those questions and answers he told both Mr. Ayres and Mr. Rizzo that he did not know Rao and he had never referred anyone to him for any purpose whatsoever.

Now, if there had been any incident on the part

of either of these defendants or anybody else to defraud the United States Government in respect to the income tax of Paterno and Sons, what would have been simpler than to have had the checks in question, one to 48, cashed by a check cashing service and it would not have required, as the bank officers testified, either a call from or a call to George Denti or to the office of Paterno and Sons.

MR. SILVERMAN: I object at this time to the point that the procedure done by a check cashing service were more stringent or less stringent than a particular bank.

THE COURT: Sustained. There is no evidence in this case of how check cashing services work, and I won't take judicial notice of that.

Go ahead.

MR. ROSENTHAL: There came a time when they attempted to prove by certain payroll records of Paterno and Son that on certain dates there were no trained operators or I think backhoe operators on days when truck drivers appeared in respect to the questioned invoices.

There were several witnesses here who testified that cranes are frequently rented and backhoes also frequently rented. In fact, almost all equipment used in heavy construction is rented with operators and that the operators will be the employees of the owners or the lessors of the

equipment. So that naturally there wouldn't be any crane operators appearing on the payroll on Paterno and Sons and the same is true in respect to truck drivers. You heard Mr. Minichino. You heard Cimino, La Spina and Capossela -- he was the other one, I think B.C. You heard them all testify that when they charge they charge for the operator as well as for the truck itself, and that brings us to another class or group of witnesses, namely, the truck operators. I will start off with Mr. Capossela of the B & C. Mr. Capossela told you that he had a company called BC Trucking; that originally there had been a Mr. B. in the company but there was a partnership and he dissolved it and that he was BC Company. It wasn't a corporation. It was a company. And the summary prepared by Mr. Rizzo, which is government exhibit 173 and which is an excerpt from the purchase journal, showed that in the fiscal year ending 1966 BC Trucking did $5,805 worth of business with Paterno & Sons, Inc., and you will recall that I presented to him a check, and in fact it is marked into evidence. I presented to him a check number 7535 and he identified the endorsement on the back, BC Trucking, and he didn't remember and wasn't certain whether he had cashed it or deposited it, and the government proceeded to call a Mr. Canty from the Chemical Bank right over here immediately directly across from City

Hall Park. It is the nearest branch, and I guess it is 258 Broadway, I'm not certain, or 268. Anyway, they called him and he had nothing to do with the branch in which Mr. Capossela had his account and he said he didn't think it was cashed because it didn't look like there was any teller's notation on the front of the check, but he wasn't certain, and nobody, but nobody, in behalf of the government bothered to get a copy of the bank account or bank statement of BC Trucking for that period and to demonstrate -- and I don't know to this day nor do you know to this day whether this check was cashed or deposited, and it is really of no importance.

The only reason why I mentioned it at all is I want you to consider and I ask you and beg you to consider the resources at the disposal of the United States Government, of the Internal Revenue Service, of the Department of Justice pitted against the resources of a George Denti and what they could do and can do and should do when they are charging a man with crime.

I submit to you there is no question that they could have definitely established it one way or the other and not leave it up to guesswork as to whether the check was cashed or deposited.

And then we had a Mr. Cimino, another trucker.

I think the name of his company was Cross County Trucking. This was, you will recall, the very staunch union man, so staunch and so interested in his union that he used a subterfuge; that he had the stock of his trucking company in the name of his sister-in-law because the union had a rule or regulation that an owner of stock of a corporation or the owner of a truck could not also act as a driver. And he was the shop steward and somewheres in his testimony -- it just sort of slid out and nobody really made any point of it -- he was a shop steward of his own company, of Cross County, so the thought that was given to you that he was shop steward of the entire job at Carmel, New York, or at least that was the inference that you would draw -- it developed that it wasn't actually so, and then we learned from Mr. Sheehan -- I believe that is his name -- the gentleman from Local 456, that Mr. Cimino was no longer a member of Local 456.

And then we had a Mr. Minichino. Salvatore is his first name and his nickname, the name everybody knows him by, is Teddy. He has a corporation known as Taff Trucking and Taff Trucking does a lot of trucking for Paterno and Son, Inc., and in fact recruits other truckers today for Paterno and Son and he told you how he had been questioned at length at the IRS, and I had asked him as to whether or

not he had not been told by, I believe Mr. Ayres, special agent Ayres, I should say, that he had information that he had made up the invoices that are involved here, one to 47A, and that he had denied it and he said "no," he had not.

His Honor, if I recall correctly, asked me why I was going into that and I replied that I thought it showed improper pressure on the part of the government, and particularly the Internal Revenue Service on this man at a time when he was being considered as the prospective witness, and if my recollection serves me correctly -- and if it doesn't, use your own recollection -- his Honor remarked that he didn't feel that this was particularly any improper pressure.

Now, I ask you to consider how anybody, anyone you know, whether it be a businessman or a wage earner, who gets involved with the Internal Revenue Service in any way, shape or form as a prospective witness -- and I told you that I would come back to the postman -- I think his name is Taglieri -- because he said something very interesting. He said it isn't very often you get a visit from two men from the Internal Revenue Service, and I'm sure Mr. Taglieri as a postman certainly had no serious worries about his return in any way, shape or form. You take a businessman, particularly a small one, or an individual or even with a

corporation, but more or less a one-man or two-man business, and he finds himself being challenged or being pressured or questioned by the Internal Revenue Service, don't you think, and I submit to you, don't you think for a moment that he must feel pressure? And Mr. Minichino told you -- I believe Mr. Brill brought this out -- that after his appearance before the Internal Revenue and after he had been told that they had information that he prepared the invoices one A to 47A and then after all of that he had an audit from the Internal Revenue in respect to his business, and that was between the time of his appearance before the Internal Revenue Service and the time of his trial.

I am certain that that was calculated and was done so that Mr. Minichino would feel perfectly at ease and so he would have no qualms about testifying one way or the other. You use your own judgment. You use your own knowledge of what goes on in this world about people in high places using the Internal Revenue Service to investigate people not in favor with them.

You saw it demonstrated right here in the cross-examination of Professor O'Connell, and I couldn't see what it had to do with his testimony. Maybe you could see it. I don't know. It is up to you to decide whether or not that was pertinent. But he was asked about checks he had

received from Paterno and Son going back to, I think, 1965, 1966 and 1967. If you think that was necessary, if you think that was important, if you think that showed anything concerning his testimony, use it, and if you don't think so, discard it and take it for what it was.

The government had an expert, a Mr. Oberg. A man came from Washington and he had to get out of here in a hurry because he had to go somewhere else to testify. If you recall, they were very disappointed that they had to stay overnight. And he came here to really tell you all about everything. Let's examine his testimony and let's see whether he was the type of witness that each one of you would want to rely upon.

He started off, if my recollection serves me correctly, and with my age sometimes your memory does fail you -- he started off talking about typewritten material and when I asked him some questions on cross-examination about the IBM machine and how many models they had and how many hundreds of thousands or maybe millions, I don't know, of typewriters that had been produced with that type of type and that type of letters, he didn't know. Not only did he not know, but he was not interested. He didn't give a good darn about it, and he told you so. This was unimportant. That might be important to an IBM salesman but not him, not

to our expert. No. Why get confused with the facts? That might just affect his testimony somewheres along the line.

And then he told you he vaguely remembered Mr. Ayres coming to Washington with the material that was being submitted to him, hand delivered, not sent by the United States mails because the United States Government wouldn't trust the United States mails to be certain that it would get to where it was supposed to go in time, a year in advance of a trial because it might -- or two years in advance of a trial because it might have shuffled off, not to Buffalo, but to the dead letter office. So we have a special agent of the Internal Revenue Service picking himself up and transporting or being transported from New York to Washington, D. C.,to the laboratory of the Federal Bureau of Investigation and he meets Mr. William Oberg, the handwriting expert, the one who testifies in court anyway, and, yes, he sort of remembers, vaguely remembers that Mr. Ayres told him, yes, the Internal Revenue Service had submitted it to their own expert in the Treasury Department, he wasn't interested in that. He didn't want to get confused by what somebody else had found, and he never went into any details and he didn't know what the findings were and he didn't even know the name of the expert to whom it had been submitted. And part of it, I submit, is plausible. In fact, if you recall I asked

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him if he were a horse player or if he had ever played horses, and he said no. And I don't know if any of you folks have or not, but I am certain that some of you have worked crossword puzzles and you haven't wanted to look at the answer until you have completed the puzzle. If you have played horses and done any handicapping you have done your handicapping and then subsequently looked to see what the selectors had picked to see whether or not it had conformed with your judgment. I will say, and I submit it is plausible, that he didn't want to know the result of the Treasury Department man, but once he had come to a conclusion and once he had made a finding do you for a moment think that he was not interested enough to see how his finding compared with the Treasury Department man's finding? Do you think that he never did learn and never did know what the Treasury Department man's finding was?

I submit that this is something that you should consider in considering the testimony of Mr. Oberg. And then, and I mean no offense to Mr. Moy, but Mr. Oberg to a certain extent reminded me of the menus that are in my favorite Chinese restaurant. He picked a capital from line three and then he took RR's from line four and something else from line 7 and it reminded me of the menus that say: "You pick one from Group A and two choices from Group B and

one choice from Group C." That is the way it sounded to me.

I submit that you have a right to consider whether or not you couldn't in almost anybody's handwriting, and you have enough exemplars, find certain variances and certain things that are similar if you had enough to pick from.

Another interesting thing about Mr. Oberg is this: There has been no denial by the government that Salvatore Minichino or Teddy Minichino or Taff Trucking during his interrogation by the Internal Revenue Service, when they were trying to make him feel nice and comfortable -- but when they were telling him they had information that he had prepared the invoices and to be certain if he was comfortable, they asked him to give them exemplars and he gave them to him. What happened to them? I don't know. There is nothing here as to what happened to them. Oberg said they were never submitted to him. I don't know.

And then let's go a little further with Mr. Oberg. The government had beautiful big blow-ups here -- you saw them on the wall -- of the exemplars of the questioned endorsements and I guess Mr. Oberg figured, well, he is coming to New York. It is a hick town. Lawyers don't know anything and they certainly don't know anything about handwriting and they are not going to ask him about scale, because who is interested in scale? So, because the thing was too big and

it may have involved another inch or something and he had, you know, to really transport this from Washington, D. C., he cropped out the scale. Yes, there was the scale on the negative, but he cropped it out or had it cropped out and he didn't even do the photography and he wasn't even present when it was photographed.

I ask you to contrast that with Defendants' exhibit AN in evidence. I think it was passed to all of you and you will have an opportunity to examine it in the jury-room again, and we can't or didn't -- I withdraw that.

At least we didn't have any big blow-ups. George Denti is a little poorer than that. But what he did have was a scale on the picture so that you could see what the actual size was on both sides so that there was no question about this being distorted in any way. So the little man does everything possible -- and it is difficult to call George Denti a little man, but in a sense he is -- the little man does everything possible to make a fair presentation to you as jurors but the government, our government, mine and yours and Mr. Silverman's also, no, they come in with a flying expert who can spend an hour, two hours in New York. I don't know where he was going. Maybe Cleveland, maybe Chicago, maybe Tulsa, Oklahoma --

THE COURT: I really don't think there is any

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need for that. He was kept here as long as he was needed. Let's proceed with this case.

MR. ROSENTHAL: You don't have to be a photography expert to know that the larger a blow-up is or the larger an enlargement is the greater the distortion.

MR. SILVERMAN: I object to that, your Honor.

THE COURT: Sustained. The jury can recall whether there is any evidence to support that. I don't think there is any substantial evidence to that effect, but we will leave it to the jury and if overnight, Mr. Rosenthal, you would like to correct my apprehension of this and check the record, I will certainly supply the correction to the jury in the morning.

MR. ROSENTHAL: I submit to each of you and to his Honor also that when you were called for jury duty you were not asked to forget any and all of your experiences in life, and all of you have no doubt at some time in your experience in life seen what is called trick photography and you have seen enlargements as well as the normal size of a negative.

Getting back to Mr. Oberg, which seems to be a touchy subject with Mr. Silverman, I asked --

MR. SILVERMAN: I would object to that and ask that it be stricken.

THE COURT: Mr. Rosenthal, I don't understand the significance of that statement. Do you want to pursue it or withdraw it?

MR. ROSENTHAL: No, I will withdraw it, Judge.

THE COURT: All right.

MR. ROSENTHAL: Maybe I get carried away with things at times. I asked Mr. Oberg, and this is my recollection, and it does not count, since it is your recollection that counts, I asked Mr. Oberg if handwriting expertise was in fact an exact science and my recollection is that he said it was, and I then asked him what I thought was a very normal and natural question, as to whether or not it could be compared to fingerprinting, and you heard the answer: He knew nothing about fingerprinting. And I think I asked him one more question before I was stopped by the court. I asked him whether or not it might be compared to ballistics, and again he knew nothing about ballistics.

Is this the type of testimony and is this the approach from a witness that you want to believe? That is the question I submit to you, that you conject the reliability of the witness by his manner, by his demeanor, by whether or not he seems to testify freely, by whether or not he seems to testify openly and honestly before you as jurors.

Now, the other government witness -- there were

two more -- we had Mr. Buchbinder, who is from the regional counsel of the Internal Revenue Service. Very impressive. Very impressive. What did he tell you? He said two or three weeks ago, I think that is what he said, and if I'm wrong I'm willing to be corrected, two or three weeks ago he had taken the figures and calculated them as to the tax due if the government's theory is correct as to the tax, in respect to the tax that was actually paid. And surprise of surprises, he came up with the same figures as appear in the indictment which was filed in May of 1973. Shocking.

It is just a matter of addition, a little multiplication, and he found the same figures. And then we had Brother Rizzo. Very likeable person. Anthony, I think, or Tony. Anthony was his first name. He told you, very frankly and properly so, that from the time he went to Paterno & Sons, he said, in December of 1970, I believe until the time he left there in April, April 30, of 1971, and he was there, I think two to three days a week, he had no problems whatsoever, nobody put anything under the rug, nobody locked the safe and said "You let me know before you get anything." He was shown the safe. He was told this is where the books and records are. He was shown the filing cabinets. Enjoy yourself.

Is this the act or actions of George Denti as a

guilty man, as a man who has done something wrong in respect to the checks and invoices of Paterno & Son, in respect to the Internal Revenue Service, in respect to the filing of the income tax returns of Paterno & Son? Is this the action of a man who has conspired with his boss, Mike Paterno or Michael Paterno, to defraud the government? Think about it. Give it real serious thought. And Mr. Rizzo was treated very, very nicely there. He went to lunch two or three times a week when he was there, and there was nothing wrong with that, absolutely nothing wrong with that, and nobody made any improper advances or suggestions to him and he didn't claim it and no claim is made by the defendants that there was anything wrong with him going to lunch. But he sort of forgot about it or he was a little reluctant to tell you about it until I showed him a photograph and that is in evidence and again you will have the benefit, if you want to take it into the juryroom, of seeing it.

Then some question came up, and, frankly, I can't quite figure out what the import was, some question came up as to when he went back to Paterno & Sons' office after April 30, 1971, and my recollection is that he had fixed a date in September or something of that sort, and then in an effort to try to refresh his recollection I asked him about the tomato plants that George Denti grew from seed, which is quite an art, if any of you have ever tried it.

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And how he was able to crow over George Denti because his tomato plants had borne beautiful tomatoes and George's plants, which were up at the office, had been hit by some blight -- I don't know what, but, anyway, they looked weak, sick and disabled and had no tomatoes.

And when he started to think about the dates he started to weasel.

He said, "No, this was before April 30th" -- he was talking about blossoms.

Well, some of you folks live in the suburbs. I have had the good fortune to live in the country -- spent my childhood there, and some of you have lived in the country, and even those of you who are in the city would know that tomato plants normally in this region -- not in Florida, of course, but in this region tomato plants normally do not have blossoms by the 30th of April. They are not that far along.

So that -- I don't know, I don't know -- I say I don't know what the import of it was, and I don't know what but I submit that it is something that you might consider in evaluating the testimony, and that is all -- and the only reason I mention it or suggest it.

Then we had the very interesting, to me, Exhibit 149. It had a big beautfiul blowup there -- and

I am sure Mr. Silverman possibly in his summation may give you another viewing of it, or a screening of it -- but you had this exhibit -- Thomas Tuccella, Michael Catenzaro, Anthony Ferrotta -- and Mr. Rizzo testified that he had asked Mr. Denti to give him the current addresses of the trucks questioned -- the questioned or questionable truckers, or the truckers in question, whatever title you want to give them -- and that subsequently he received Exhibit 149, and somewhere along during his examination, whether it was Mr. Brill's cross -- I do not think it was direct -- or my cross, I don't remember -- he said no, he had not seen George Denti write it, and he said no, George Denti had never told him that but that he, Anthony Rizzo, had in his own handwriting written the following legend:

"Address-Current given by George Denti" -- that would be part of his testimony -- "and written by George Denti R/A Rizzo".

A little thing, a very little thing, but to me a very big thing, because this to me means that Mr. Rizzo is willing to jump to conclusions without any proof. And Mr. Rizzo is, although Mr. Ayres is the special agent in charge -- Mr. Rizzo, so far as I can see and so far as you can see, the man who worked up most of the

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material for the government in this case.

Then we had some other witnesses -- very recent, like Mr. Clausen with his diary about the snow, and I think Mr.Nebensky, if that is the correct name --

MR. BRILL: Nebesny.

MR. ROSENTHAL: Nebesny -- an inspector for the City -- and I am not going to go into the defense witnesses but I am going to leave that to Mr. Brill since he conducted most of the examinations of the witnesses. But you will recall Mr. Silverman read to you in the very early part of this trial questions and answers -- questions propounded to George Denti and answers given by him down at the Internal Revenue Service office, and then it was my privilege today to read to you some additional questions and answers that were also propounded at the same time and at a later date. And something interesting happened then -- that is why I read particularly, although it isn't designated as a question -- particularly the statement which appears at No. 376, and it was to the effect "Oh, gee, this is 376" -- that means there have been 375 questions and answers given before this -- somebody realized, "We forgot to swear you", and George said "Well, forget about it. You did not swear me. Forget about it."

George offered no objection to being sworn after

being asked 375 questions and after giving, to the best of his ability, 335 answers.

Now is that the action that you would expect from a guilty man?

Is that the attitude that you would expect from a man who believes he has done wrong or knows he has done wrong, or has in fact done wrong?

I submit to you that that may be considered by you, and should be considered by you. The government is always willing to show acts that they say depict consciousness of guilt, and they haven't shown any in this case.

I submit to you that as triers of the facts, you, judges of the facts have a right to consider acts and actions of George Denti that indicate to the world, to Tony Rizzo, to Mr. Ayres, to the Internal Revenue Service, to the United States Government, and to you as jurors -- acts and actions of George Denti that show that he had nothing to hide, that he was not fearful of anything, and that you may, I submit, infer from that that this was because in fact he had done nothing wrong.

Now we called in behalf of Mr. Denti some character witnesses -- in fact, one we did not -- one the government called, and that was Mr. Andretta -- and he told you that he had known George for many years, knew many

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people who knew him, knew what his reputation was.

I did not ask him at that time about veracity or truthfulness because up to then the Q and A had not been introduced, so it would not have been a proper question, but I asked him about business responsibility and honesty and the like, and he gave you a high, high rating.

And we had a Dr. Grant, a dentist. We had people that you would normally expect George Denti to know. We did not have any bank presidents. We had a vice president because the government brought him here. We had Mr. Esposito, who is in the public school system, and we had the mannequin manufacturer, a former neighbor, Mr. Onorato -- I think you heard him, and I do not think you can forget him.

We had Sister Jane this morning -- and it was very interesting to me to observe the new mode of the dress of the religious order -- I approve of it.

We had a Mr. William Mullen in the insurance business.

Now his Honor at the proper time will instruct you as to the meaning or import of character evidence, and I will not attempt to usurp this function. You probably sit there, each one of you probably sit there and say "So what? He had some friends come down and say that he is

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a good fellow, and they know other people who say he is a good fellow -- so what? Nothing to it. Anybody can do that".

Don't you for a moment believe it.

God forbid that any one of you ever would have to ask your dearest friend to come to court to be a character witness, and you would be confronted with "I will write a letter for you" -- "I will call the Judge" -- but my grandmother is sick on Wednesday, I cannot possibly be there" --

MR.SILVERMAN: Your Honor, excuse me, Mr. Rosenthal -- your Honor, I am going to object to this line of questioning -- to these statements.

THE COURT: Yes. Those are propositions that are not matters of fact, Mr. Rosenthal. I do not find any support for when witnesses will or will not come.

I will say also that you have used 90 minutes.

MR. ROSENTHAL: What is that, sir?

THE COURT: You have used the hour and a half that you requested.

MR. ROSENTHAL: Well, I told your Honor that I had not blocked it out --

THE COURT: Yes. Try to draw it to a conclusion.

MR. ROSENTHAL: I will try, sir. You realize I have

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been working under pressure in respect to this.

THE COURT: Yes,I realize that -- all trial lawyers do.

Please try to organize it and bring it to a conclusion.

MR. ROSENTHAL: Well, at any rate, the people who are called by George Denti as character witnesses -- and if I said this before, on the pain of repeating myself I will say it again -- that they were the sort of people you would expect him to know both in the social world and in the business world.

Now I am getting near the end. I ask you not to lose sight of the real question involved here. The way the case has been presented, with all of these witnesses from the United States, from the income tax service, the Motor Vehicle Bureau and the Compensation Board and everything else, it would seem that the government is trying this case on the theory that if they can establish to your satisfaction that John Aurrichio, Michael Catenzaro, Anthony Ferrotta, Thomas Tuccella and/or Arthur Lazravitch were either non-existent or cannot be found, that that proves, without question, that George Denti, Michael Paterno and Paterno & Sons, Inc. committed a fraud upon the government.

Now that is not the issue in this case. There is a very simple question involved here, and that is whether or not the trucking necessary -- I will withdraw it -- whether or not the trucking that is mentioned in the invoices, 1-A to 47-A, was in fact performed for Paterno & Sons, Inc. -- that is the question. Did they need these trucks and did they need this trucking for the excavations -- and you heard Professor O'Connell's estimate of, I think, 180,000 -- was it? -- cubic yards that had to be excavated or backfilled or brought in.

Were they supposed to do it with a spoon? Or with a sand pail like a child uses at the beach in the summer? Or did they need dump trucks and did they get dump trucks, and did they pay for dump trucks -- and that is the question.

There has been no one here who testified in behalf of the government, either on the direct case or in any rebuttal that in fact the trucking billed in Exhibits 1-A through 47-A were not in fact required for the performance of the contracts and the work undertaken by Paterno & Sons, Inc. -- and that, I submit, is your basic question. That is what you are really called upon to answer.

Then there is another consideration -- and now I speak solely for my own client, for George Denti --

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has there been anything offered here to indicate any motive or any reason why George Denti would lend himself to a scheme to defraud the government?

Mr. Silverman in his opening statement, if my memory serves me correctly -- and if not I am positive he will correct me -- in his opening statement he said that the government doesn't pretend to know and doesn't propose to show where this so-called additional tax that was saved, where it went to, who got it or why.

So there is no claim that George Denti profited in any way. He isn't Paterno & Sons. He is an employee. The fact that he has got a title, that might make him feel better but it doesn't make the pay envelope any fatter. Sometimes people prefer titles to money -- maybe George is that way, I don't know. But what profit was there in it for him? Why would he endorse checks and send them to the bank and get them cashed? Why? Nobody claims that he was stealing from Mike Paterno. That would be your only other reason that you could come up with, and that has never been suggested here.

Now heeding his Honor's admonition, and also heeding my own physical being, and also being considered of your ears and your patience in listening to me, I have certain personal worries when I try a case -- and it is

true in this case, and it is true in every case. I like to think that I have a positive personality. I have realized that everybody at first blush or at first glance doesn't fall in love with me, and say "He's a wonderful man", and they will not be a character witness for me.

On the other hand, I realize that I might brush some people the wrong way, and it may have happened during this trial -- I don't know. If it has, it was unintentional. It is just my own personality which I may not be able to control, but I ask you, if that has happened, then please bear this in mind -- if it has happened, don't hold it against George denti. Charge it to me, because I go home at the end of this case.

You are faced with the responsibility of deciding whether or not the government has proved to the satisfaction of each one of you beyond a reasonable doubt that George Denti is in fact guilty of conspiring with Mike Paterno and others in respect to income tax of Paterno & Sons, Inc., and whether George Denti knowingly either signed or aided and abetted -- aided and abetted the filing of false returns by Paterno & Sons, Inc.

You are not charged with responsibility of deciding whether Gil Rosenthal is a louse or a nice guy. That doesn't enter into it, so please don't use my own

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idiosyncrasies against my client in deciding it.

And one thing more -- and this is another thing that always worried me, and as years go on it will worry Mr. Silverman -- when I first came to the bar it was during the depression. I am sure maybe none of you are that old but you have heard about the depression. At that time the prosecution was always an older man because anybody who had a job with the city or state or federal government wasn't giving it up, come hell or high water he was holding onto that paycheck -- and I don't blame him.

So that I was in the reverse situation. I was a youngster against the older person -- and I am honest enough with myself to realize that at times with a jury the fact of my youth may have helped my client.

Now the shoe is on the other foot right now, and it pinches, and I don't mind it pinching me but I don't want it to act against my client. It's not a popularity contest. I couldn't hope to contest with a man of Mr. Silverman's ability and his personality -- I wouldn't attempt to, so that I ask you again not to use my own deficiencies or Mr. Brill's, for that matter -- he is a youngster about my age -- don't consider these two old coots against a fine looking, vigorous, articulate young prosecutor.

Now with that I have two other things that I wish

to touch on.

As I stand here talking to you, I am not talking to you with dollars and cents in front of my eyes. The canon of ethics do not permit an attorney in a criminal case to have any contingency arrangement, so that it makes no difference to my pocketbook or my pocket as to what your verdict may be. So that that is not governing my thinking.

The second thing that I would like to go into is this -- I believe it is a nine-count indictment. Many times -- at least it has been my experience, and I am sure it has been the experience of others -- jurors get into the jury room and sometimes they find themselves in disagreement, and along comes the great Chamberlain who is going to arrange everything and says "Well, let's compromise. Let's make the prosecutor happy, let's make the defense happy. We will find him guilty on Count 1, not guilty on Count 3", and so on and so forth.

It doesn't work that way, and it should not work that way.

And I submit to you, and I ask you that in doing your duty not to compromise -- either for me or against me. And when I say "for me" I mean for George Denti or against him, but to consider each and every count on the question of the proof offered by the government.

And remember, you are not, as I told you in the opening, you are not here to consider is George Denti guilty or is George Denti innocent? That is not the question, that is not your verdict.

The verdict that will be presented by you is guilty or not guilty, and by that verdict you say either the government has sustained its legal burden of proving to the satisfaction of every one of you twelve beyond a reasonable doubt the allegations contained in the indictment, or they haven't.

And if they haven't it is your sworn duty, no matter what you think that anybody else may want from you, anybody in this courtroom may want from you -- it is your sworn duty to return a verdict of not guilty.

With that, and with one more expression of gratitude to each of you, particularly for your patience in listening to a rambling summation, I thank you.

THE COURT: All right, we will take a ten-minute recess.

(Jury left courtroom.)

MR. SILVERMAN: Your Honor, if I may, in view of Mr. Rosenthal's statement -- I am quoting from my handwritten notes, your Honor, where he says he goes home at the end of the case, meaning Mr. Rosenthal --

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MR. ROSENTHAL: I am sorry, I cannot hear you -- your back is to me, Mr. Silverman.

MR. SILVERMAN: In view of Mr. Rosenthal's statement where he made mention of the fact that he, meaning Mr. Rosenthal, goes homeat the end of the case, I am going to ask the Judge to reconsider his previous ruling as to whether or not to charge the jury as requested by the government on the grounds of possible punishment.

THE COURT: Yes; it is granted.

MR.SILVERMAN: Thank you.

MR. BRILL: I have an objection to that, your Honor.

THE COURT: All right, it is overruled.

(Recess.)

(Jury in the box.)

MR. BRILL: Shall I proceed, sir?

THE COURT: Yes.

MR. BRILL: With your Honor's permission, Mr. Silverman, Mr. Rosenthal, Mr. Ehrlich, Mr. Foreman, ladies and gentlemen of the jury:

It is difficult, after the exceedingly and comprehensive review of the evidence which Mr. Rosenthal gave you, to follow and be able to amplify by very much. Consequently, circumstances compel me to be brief, and circumstances is one of the things about which I plan to talk to you during the time allotted to me.

I want at the outset to say on my own behalf and behalf of my clients, both the individual like Paterno and the company of which he is president, thank you for your service, for your attention and for your devotion to a difficult and unpleasant task which requires sacrifice on your parts as well as causing inconvenience to you. I join with my Brother Rosenthal in asking you to please forgive me if by any chance or by any act or by any word I may have offended anyone of you. Certainly it was not intentional. In the course of a lawyer's job zeal sometimes overwhelms him and he says and does things which under other circumstances he probably would not do, so if at any time in the course of our having first me since February 6 of this year up to and including the time when I finally sit down and I have said the last word that I have a right to say on behalf of Mike Paterno and his company, I ask you to please take that into account as being an unintentional breech on my part, if you regard it as one.

Under our system of criminal jurisprudence, an adversary system, there are two sides, both of which are represented. The indictment is brought in the name of the United States of America against the defendants. That does not mean that the United States of America and its population as such, including you ladies and gentlemen who will soon be

assuming that heavy burden of being the sole and exclusive judges in this case, are or need be or must be against Mike Paterno or any other defendant in the case. It is the method, the manner by which the case comes into court and it is merely a label, that is all it is.

There is, of course, a requirement that there be someone to supervise, to put it in simple parlence, to call the shots, so to speak, and the judge of the court has the responsibility for maintaining the conduct of the trial, ruling on the questions of law which are raised either by the prosecution or the defense. And each person who has a part in these proceedings undertakes the responsibilities that go with that part and does his best, even though sometimes, because we are all human, each of us may make mistakes.

As you have learned in the course of your own life experience, there are occasions when you are not in total agreement with a position taken by some other person, some other group, some other organization, some other agency. You have to think it out for yourselves. And so it is in a courtroom where the 12 jurors who are finally given the submission of the case and who become the sole and exclusive judges of all the facts in the case, and whose judgment alone is the only judgment in the case, based upon the recollection

of each one of you, and hopefully altogether, when you finally reach a determination, if in good conscience you can, and on the basis of reason you have analyzed the evidence in the case. I believe that in every case there come times and occasions when perhaps motivated by the pressure of inconvenience or whatever the reason may be, people sometimes fall into the error, as conscientious as they may be, of working out a compromise. I am going to tell you at the very outset what my brother-in-law Rosenthal said at the end: You find a true verdict, a verdict based on the evidence as you and you alone recall it, without regard to sympathy, bias or prejudice, only upon the evidence, and not as a matter of compromise, not as a matter of convenience, but as a matter of justice, justice because the evidence calls, requires, demands, if you please, that you reach, each of you reach independently in reviewing the matter and the reasons for your judgment together, such a judgment.

Each of you has and will have your own conscientious views and you are not required nor should you under any circumstances give up those conscientious views simply because someone else may be anxious to arrive at a determination with which you are not in accord, and here, too, so long as you have reasons, and that raises the very next subject about which I would like to talk to you.

You have heard and you will hear again not once but several times that in a criminal case, and that is what we are here in, a criminal case, apart from the considerations whichhis Honor will tell you about you must take into account, that you must find beyond reasonable doubt that the prosecution has sustained its burden, under no circumstances is a defendant required to prove anything. The prosecution is required to prove its case and if you find from all the evidence that it has failed to prove, either by reason of it not having produced evidence to your satisfaction beyond a reasonable doubt or by the evidence for which you find and in which you find a reason for doubt, then you should call exactly what you find, you should call the defendants not guilty, each of whom is entitled to your separate consideration and your separate judgment, and I am sure his Honor will tell you you should consider that each of these defendants is on trial as though by himself or, for that matter, the corporation by itself, so that when you sift the evidence and you examine it, reason with it and determine whether or not there is a reason for doubt.

I believe that on the basis of the evidence in this case, some of which I will attempt to recall for you, and please remember that it is not my recollection nor the recollection that my brother Rosenthal or my brother

Silverman or even his Honor, with all deference to his Honor, that controls or governs you as the members of the jury who are, as I said before, the only judges of the facts in the case. Your recollection alone is what governs what you finally decide, not what I say and not what anybody else says to you in this courtroom, applying the law as the court gives it to you to the evidence as you find it.

There are, I respectfully submit to you, ample reasons and many for your conclusion and from which and by which you will be convinced that the evidence is not at the level required by law, beyond reasonable doubt, that which has been adduced or that which the government has an obligation to adduce and which you find it has presented, it has not presented.

Let's start out with the beginning of things. It all started back, apparently, in January of 1971 when Agent Rizzo of the Internal Revenue Service, having previously been assigned to make an audit of the returns of Paterno & Sons, which are in evidence and which you will recall were received without objection on our part, and which set forth the items of income and expenses, although it does not identify any one of these returns, the particular expenses or deductions taken with respect to a particular vendor or employee -- they are all lumped together -- and you are

called upon to separate that lumping by the prosecution because of a technique which has become very familiar over a long period of time now, maybe 40 odd years, of repeating and repeating and repeating and repeating to the point where you believe that the repetition as constant and frequent as it may be made must become the fact. Nothing could be further from the truth. You are called upon to assume from the circumstances for which a contention is made that because it is frequently repeated as outlined in his extensive summary of the evidence by my brother Rosenthal, that it must be the fact established by a negative process.

Again, nothing could be further from the truth. You would be required under such circumstances, if you are to accept that hypothesis, to leave your common sense outside of the juryroom in which you will conduct your deliberations and you will be called upon to forget everything that you ever saw or heard or did or said or thought in your whole lifetime, and I mean in the lifetime not only of any one of you ladies and gentlemen, but of all of you. That is not what is required under our system of criminal jurisprudence.

What is required is that you should analyse the situation, consider the evidence and consider what happened on the basis of the very first occasion, beginning with that

when Mr. Rizzo presented himself at the offices of Paterno & Sons, Inc. and made it known that he was an Internal Revenue Agent about to conduct an in-depth audit. What was the response of those persons whom he met at Paterno & Sons?

"By all means, Mr. Rizzo. There is the space which contains all the records, all the books, everything that you want to see. Just ask for it. Help yourself. It is available to you."

Do you believe, any one of you, that persons or a person who had planned for years to work at a method to cheat the government, yours and mine and their own, if you please, of the just amount of taxes would respond in that way without hesitation, without any pressures?

"What do you want? Just ask for it, it is yours."

Now, I can't anticipate, nor do I propose to, all of the arguments which will be made by my learned and able friend, brother Silverman, but I am sure that you will hear phrases like: Smoke screen, a cloud of dust, red herrings, and all the usual trivia and drivel that is proposed and argued to juries in connection with the claims of defendants in criminal cases.

I am not going to try to anticipate his arguments, and I don't care how he characterizes mine. I know that I will sit down at the end of the time allotted to me,

saying to myself: I should have said something about such and such, a piece of evidence, and like all trial lawyers who don't sleep the night before they know they are to make a summation, because they are thinking about what they might say, or the night that they have made it because they think that they omitted to say something, or the next night, because they then say what they would like to have said to the jury on the basis of the evidence, I too being human will commit the same human errors. If I do, please bear in mind that I don't do it deliberately.

I believe that the evidence shows, and this is my recollection and only my recollection, that after Mr. Rizzo was conducting his in-depth audit for some three months with a free run and complete access to anything he wanted on the premises occupied by Paterno & Sons, he then came upon two names -- he told us about those -- within the first three months he was there, January, February and March of 1971. On April 30, 1971 he asked Mr. Denti to give him the addresses of three other names.

MR. SILVERMAN: I would like to respectfully object to what Mr. Brill has said. It has misstated what Agent Rizzo's testimony was. His testimony was that the first period of checks that he examined were for January, February, March of, I believe, or April, May of 1965, and

the first mention of any of this that came out on the trial was in April of 1971 when he brought this to Mr. Denti's attention. There was no mention made as to what date he found the first check. The period covered what the first three months of the fiscal year we are talking about.

MR. BRILL: I think, your Honor, I stated that this was my recollection and it doesn't bind the jury. The jury has its own recollecti-n.

THE COURT: Is it important, gentlemen, which of those versions is correct? If it is, given the schedule we have, we can check it overnight and ascertain. Let us do that. Go ahead, Mr. Brill.

MR. BRILL: Thank you, sir.

Whatever the date was, whatever it was that Mr. Rizzo examined, he got it freely, cooperatively and you will remember that he finally acknowledged under cross-examination that he thanked Mike Paterno for the full, unlimited cooperation which was given to Mr. Rizzo throughout the entire period he was there.

Now, there is a strange circumstance, and I think you will recall the evidence with respect to it. It was touched on by Mr. Rosenthal and it dealt with the matter of growing tomatoes. You may consider whether the confusion with respect to the time when the tomatoes blossomed or

rippened was an effort on Mr. Rizzo's part to cover up, if you please, a circumstance which he did not like to admit and about which in his own daily activity reports he did not make a single mention. I refer to the visit which he made to the Utopia Parkway job. When he went there with Mike Paterno and where he saw not only excavation activity going on with these large pieces of machinery dumping the material excavated from the ground into dump trucks, some of which were unmarked and about which he couldn't care less as to who were the truckers, even though he was invited to check on the particular truckers.

t6-3 MR. SILVERMAN: Objection, your Honor. Mr. Brill is now testifying. The question he asked Mr. Rizzo at the trial, during the trial, was whether or not Mr. Paterno pointed out trucks to him that were unmarked and Mr. Rizzo's answer to Mr. Brill was that he did not recollect that taking place.

THE COURT: Again I think I will leave that to the recollection of the jury and if they want that read we will allow it to be read, and if anybody wants to dig it our for tomorrow I will allow it, but I don't think it is necessary.

All right, Mr. Brill.

MR. BRILL: I will take it as suggested. He

didn't recall.

Now, here is a man who was on a specific assignment who does not make an entry in his daily activity reports, who is concerned with finding out where the money was spent in connection with one small part of the total operation on a particular job where he saw all these other activities which you will remember, Mr. Rizzo reluctantly admitted he saw being carried on besides excavation, he said he couldn't recall. If you don't regard that as a failure to deny, then you must say to yourselves that if he couldn't recall he didn't remember and if he didn't remember he couldn't say yes, and if he couldn't say yes the answer has to be no. I think that is fair and reasonable and you can reach that determination and, if you do, you already have more than one reason to adopt.

I don't believe that in the evidence there is a single word about Mr. Rizzo's concern about the location of a job except that after several jobs about which he was asked by the prosecutor on redirect examination had been completed, he said he went out with Mr. Ayres to look at those jobs. Now, what he could find on those job sites after those sewers had been put down in the ground and covered over and asphalted or concreted, or whatever it was that was done, I cannot for a moment imagine. Perhaps you can.

But he didn't even have a memorandum in his daily activity report with respect to the visits to any of those jobs which at the outset would lead one to believe he saw in operation but which he I think reluctantly admitted had all been completed when he went out there with Mr. Ayres.

Now, I suppose that was in the nature of a picnic, a junket,a jaunt, to go out and look at the streets and the sidewalks and maybe a manhole, if there was one. I don't know. But how could he tell whether or not there had been excavation from looking at the street and how much material had in fact been excavated?

You reason for yourselves why he went there and you will find reasons for doubt. He wasn't interested in the amount of material removed. He didn't care about the location of the dump site. He wasn't interested in the number of truck days it took to do a particular excavation job, not one bit. Nor did the prosecution produce a single piece of evidence with respect to thosematters until on the cross-examination of Mr. O'Connell the prosecutor asked: "What did you say was the total amount of material excavated? Did you say 188 thousand? Wasn't it 140 some odd thousand?"

And then, plus the bulking factor, didn't that only bring it to 161 thousand? In short, the suggestion was that that man who sat on that stand who had performed

professional services in other years going back to 1965, for which he was entitled to be compensated and was in fact compensated was lying to you. That is the suggestion. That is the purport of that line of examination. How come there is a difference of 25 thousand cubic yards of material? And when Mr. O'Connell said, "Well, the material on the stock pile which was taken to the stock pile and brought back to the stock pile, according to the specifications which are in evidence, and the plans which are in evidence, was required to be there and it contained 25 thousand cubic yards of material which was, as he said, double handled, taken to the stock pile, brought back for fill where it was suitable to be used as fill. That is what brought it to 188 thousand cubic yards.

There was a price that had to be paid for the hauling of that excavated material and we produced those prices for you. We produced them not only on the basis of the invoices which were not related to those persons who were repeatedly called the non-existing truckers, but also after the computation here in court including those so-called non-existing truckers.

Doesn't that raise another reason for doubt?

MR. SILVERMAN: I respectfully interrupt Mr. Brill at this time. There has been no evidence in this case as to

the cost of hauling the 188 thousand cubic yards of material, your Honor.

THE COURT: It is argued there is evidence relating to that subject and I think that is permissible argument. I will allow it.

MR. BRILL: Thank you.

Each one of those jobs which aggregated in total -- there were three jobs about which Professor O'Connell testified -- 188 thousand cubic yards of excavated material was completed in conformity with the plans and specifications to the satisfaction of the municipal agency, whether it be the City of New York or the Water Department or the Town of Carmel. They were all satisfied. There were no complaints. The job was done and it was done well.

Now, these impressive black books which contain plastic envelopes and each of which contains a particular check -- it is a dramatic way of presenting them, but they add nothing to the proof in the case.

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At least three of the people who were the payees of these checks were affirmatively identified at the bank where the checks were cashed.

Mr. Aurrichio was described by the witness Andretta.

Mr. Tuccella and Mr. Lazravitch were also described by the witness Andretta.

Here again it is respectfully submitted to you judges of the facts that you have reasons for doubt. It doesn't matter and it did not matter by what name or what was the shape or form of the bill for the work that was done, so long as the work was done. And you will recall the testimony that came from the mouths of the bookkeepers when an invoice, regardless by whom it was presented, was given together with a check to be signed by either Mike Paterno or Tom Cohill, who were the authorized signatories on the check.

Neither of them, in accordance of the policy and the practices of Paterno & Son, would sign that check without backup material which had to be either clipped or stapled to the bill in order for either Mr. Paterno or Mr. Cohill to be satisfied that the bill in fact was due and owing and payment should be made.

This is an interesting thing in connection with these bills. Among the exhibits which were introduced by

Mr. Rosenthal on the examination -- I think it was of Mrs. Altro -- you remember whose it was -- Exhibit No. 6, there is a bill on the heading of B. Nappa Trucking Co. It is dated May 6, 1968 -- 5-6-68.

It is not a big bill, to be sure, but there is a legend on it. It says "Care of Thomas Dee Truck Co., 9725-99th Street, Ozone Park, New York."

Now keep that number of that address in mind, and recall, if you will, please, the testimony of Teddy Mirichino, who was described by Mr. Rosenthal as not really subjected to too much pressure by the Internal Revenue Service, except for the audit between his examination at their offices and his next appearance at the grand jury. But he described that mile of garages on that street in that area in which there were numerous truckers, many, if not most of whom he did not know, or whose names he did not know, and who had unmarked trucks -- and there you have a basketful of reasons for doubt.

There was an effort made -- a slight one, to be sure but an effort made to try to persuade you that possibly these invoices which were in evidence as Exhibits 1-A -- yes 1-A through 47-A, handsomely bound up like the checks, might possibly have been typed in the office of Paterno; but when the questions were put to the people who could know

about them the answers rang loud and clear -- no such thing ever happened, and for each invoice the answer is negative.

So you have an additional 47 reasons for doubt.

Concededly, according to Mr. Rizzo, there was nothing wrong with the income reporting, and it was in complete accord with Mr. Bressler, the accountant's work sheets. You remember that Mr. Bressler was called and asked about these, and he told you that they were his work sheets, and that he prepared these returns, and they were submitted, and they were signed by the persons whose names appear on them -- on, I think, three of those years they wre signed by Mike Paterno, and one year by George Denti.

Now there was no dearth of handwriting samples, but when requested by either Mr. Ayres or Mr. Rizzo, whenever it was that they were requested -- and I believe your recollection will tell you when it was -- mine says in or about October of 1971 -- after Mr. Ayres had been informed that the then lawyer for Paterno & Sons was going to conduct an investigation with respect to who were and where were these particular individuals -- Mike Paterno was asked for handwriting samples, and without hesitation he gave those samples ---they are in evidence, Exhibits 1 to 155

inclusive, and he signed each of the names he was asked to sign, I think some ten times on each one -- they are available for you to look at.

Mr. Oberg, the expert, finally said, when I asked those few questions towards the end of his examination, that he couldn't find -- and this is merely the substance -- he couldn't find that there was any connection between any of the handwriting given freely at the request of Mr. Ayres and Mr. Rizzo by Mr. Paterno with any of the endorsements on the checks.

Again, I respectfully submit that you have reasons for doubt.

And there are some more. There is an interesting one -- or three, I should say, that arise out of the testimony of that paragon of virtue, Mr. Capossela.

Mr. Capossela, you recall, testified that while doing work for other people at Carmel, he did some work for Paterno & Sons -- and he testified on direct examination with respect to this fine record that he maintained, Exhibit 108 ---he did it in his own handwriting, and he did it at the time when he was doing the jobs.

He had forgotten, obviously, that he had sent the bills for these jobs for work that he did in October and November of 1965, and I presented him with those

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bills, the first of which was the bill for the month of October when he worked for some ten days -- from the 18th to the 28th --- and he acknowledged reluctantly that the bills and Exhibit 108, his entries for the dates in question shown on Exhibit I, Defendants' Exhibit I, just did not jibe.

In short, as he put it, Exhibit 108 is not reliable, and I suggest to you that neither is any of the other evidence in this case offered by the government any more reliable than Exhibit 108, which Mr. Capossela in his own hand admitted wasn't really worth considering.

He made another mistake. He was his own office force. He addressed the first bill to Paterno Contracting Corp. in Mount Vernon, and that apparently came back to him because it did not go to Paterno & Sons; so he took it down to the office and he asked for his money, and he got it. He got the amount to which he was entitled, or at least a part of it. He got $600, according to the bill -- of the $2300 he got $600 on the 10th of October, and he got the balance on the 11th of November, I think it is -- you will see it --- you will look at it yourselves and you will make your own determination.

Here again, at the expense of repetition, which is within the realm of truth, you have reasons for doubt.

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Mr. Capossela, as well as Mr. Minichino and others -- I think Mr. Cimino, but again please rely upon your own recollection -- told you that it was a common practice among truckers to solicit jobs, dump trucking jobs of the site when they learned of a job.

They told you also that when called upon to bring a truck or two or three or more than they themselves had, they in turn informed others, who in turn informed others, and maybe finally fifth hand there came to the job site the required number of trucks.

Nobody stopped to ask, "What's the name of your company?"

Nobody stopped to ask "What is your address?"

When a dump truck went off the job site to the dump site, a ticket was signed -- sometimes by a foreman, sometimes by a laborer or some other employee of Paterno & Sons -- and sometimes even by a person who was a total stranger to Paterno & Sons -- and that you will recall is in the evidence -- and it, too, raises reasons for doubt.

It seems strange -- and probably you thought so, too -- that in these two magnificent diaries which were kept for the personal edification of the gentleman who was supervising the job at Cedarhurst, there is no record, as he admitted, of the number of trucks that were used on that

job, the number of truck days involved on that job, the amount of material brought to or taken from the job. There is a very limited purpose about which I have no doubt you will hear a great deal about, for which some four or five pages in these two books were offered, but they do not relate to the amount or volume of material that was excavated or brought to the job -- and again at the expense of repetition, which I decried earlier, you have reasons for doubt.

In that regard you will remember that Mr. Clausen said that that job was done well, it was done in compliance with the plans and specifications, that it was completed satisfactorily and in essence there were no complaints.

Mr. Nebesny, the inspector, the assistant civil engineer of the City of New York, substantially testified to the same, as did Mr. Tellefsen who came here yesterday to authenticate and effect the admission in evidence of the plans and specifications for the Johnson Avenue job; as did Mr. Siegal who did the same -- the borough engineer for the Borough of Bronx for that nearly three-mile sewer, called the Watson Avenue job, which ran on both sides of the Bronx River Park Expressway -- all complied and completed in conformity with the plans and specifications -- well done -- more reasons for doubt.

Mr. Rao, at whose establishment some of these checks were cashed, was asked by my brother Silverman whether he knew or ever talked with Michael Paterno, and his answer to those questions rang loud and clear -- they were negative, absolutely no.

So for each one of the checks claimed to have been cashed in that establishment you have an additional reason for doubt.

I wanted, in passing, merely to make a short reference to Mr. Nebesny at Johnson Avenue, I think it was. You remember that there was an agreement between us, between Mr. Silverman and myself, which was read to you in the form of a stipulation, that on or about a certain date -- and I must confess it is either the lateness of the hour or the advancement of my years, I don't recall the year in which it occurred, but I do remember that it was in that week in February, which last week would have been an anniversary for -- I think it was the 9th or 10th of February -- in which we agree that if a meteorologist came to court he would testify that approximately 20 inches of snow fell in the vicinity of Johnson Avenue -- and Mr. Nebesny had some kind of record which supported that; but interestingly enough he had no idea about how that snow was removed, and apparently from the record that he had it wasn't

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there for just one day. 20 inches of snow is an awful lot of snow, and it just doesn't disappear. It doesn't go away by itself. And I think he admitted -- and you will recall whether or not he did -- that it was removed by Paterno & Sons. By what manner? By what kind of equipment? He was unable to say. He was totally blank on that because he made no record of it and had no independent recollection -- but you have additional reasons for doubt on that score.

Now I think it must have been made clear to you by the testimony of the bookkeepers, that even though he was highly meticulous about being certain that there was backup or substantiation for any check that Mike Paterno signed, he signed thousands of checks during this four or five-year period -- I think there are five fiscal years involved -- how anybody in the world, the bookkeepers or anyone else, could be expected to remember a particular payee independently is beyond the comprehension of many people, and possibly even some of you ladies and gentlemen who will be sitting as the final judges in this case.

There was a very interesting bit of evidence developed -- and a big deal was made about it -- on the examination of one of the bookkeepers -- I have forgotten which one, but you will remember as soon as I tell you about

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it.

There were two invoices, Exhibits 25-A and 25-B. These were invoices which were submitted by the questioned truckers, Anthony Ferrotta. 25-A was stamped in accordance with the practice and policy at the offices of Paterno & Sons as being received on November 15, 1968, and it was paid on December 12, 1968 by check No. 1346.

Now there seemed to be something very strange about this, because Exhibit 26-A was dated as having been received at the offices of Paterno & Sons on March 4, 1968, but it was not paid, although received earlier, until after the later bill was paid.

In short, 25-A received November 15th, which related to the Johnson Avenue job, was paid on December 12, 1968.

26-A, which was received on March 4th but not paid until December 1968, related to the Peninsula Boulevard job. Butthe mystery soon evaporated. The bookkeeper, whichever one it was, told you very directly and very frankly, that theypaid the people who performed services or supplied materials for a job when they got paid for that job.

And what happened here was that they weren't paid for the Peninsula Boulevard job until after they had

received payment on the Johnson Avenue job -- and that is all that that big mystery amounted to.

I think it generates additional reasons for doubt.

We have evidence in this case that truckers did not know other truckers working on the same job site.

We have had evidence in this case that truckers came looking for jobs on the job site, and that these were common practices and procedures in the dump trucking industry concerned with the removal or haulage of excavated material to come and solicit work.

Now satisfied with the fact that there was substantiation and backup material, what difference could it possibly make to anybody at Paterno & Sons, especially the man who signed the checks, whether he be Mike Paterno or Tom Cohill --what was the name of the trucker, or what days he worked on so long as that trucker did the work for which he was being paid? That was the criteria -- that was the way in which this was effected. That is the way it worked.

And among other things, in reaching the close of my summation, at the point of repetition again, the haulage part of the Paterno & Sons business was only a small part of each of the total jobs -- and that you heard from Mr. Bressler who was questioned closely about how the

business grew over the years by the prosecutor and who, you will recall, gave you some evidence of how that business grew when talking about a particular aspect of the job.

Mr. Buchbinder, about whom Mr. Rosenthal made some comments, and through whom Exhibit 165 was introduced, has to be a very good computer because three weeks ago, some nine or ten months, whatever the period is, since May 3, 1973, he was able to arrive at exactly the amounts which are set forth in the indictment which was filed on May 3rd -- not by going over Mr. Rizzo's figures, who actually made the in-depth audit but by looking at a report which Mr. Ayres prepared and about which we heard nothing until Mr. Buchbinder told us how he arrived at his figures.

It seems that he thereby created additional reasons for doubt -- if they weren't already there.

There is not any suggestion in the proof -- in fact by Mr. Silverman's own statement to you ladies and gentlemen, not one penny went to Paterno & Sons or Mike Paterno of any of the proceeds of any of the checks which are in this very magnificent, handsomely bound book, Exhibit 147.

Since you have seen them only today I see no reason now for entering upon any long discourse about these photos of the Watson and Johnson Avenue jobs, but you have from them a fair representation of the nature and extent of the jobs and the extent and nature of the excavation and the volume of material that had to be removed.

There is no proof in this record, no proof before you judges of the fact that Mike Paterno at any time had any knowledge that one cent of any of the monies reflected by the checks which he signed after being furnished with the back-up material was not intended to be for the payee. He never knew or heard or met or saw, since the evidence is completely lacking in respect of that, anything about them until sometime perhaps in October or August, I have forgotten which, and you will remember when it was, in 1971 when Mr. Rizzo and Mr. Ayres went to see Mr. Paterno and when Mr. Paterno told those gentlemen that his then attorneys were checking up on the identify and the location of these "questioned truckers."

I believe that his Honor will tell you that in order to be certain beyond reasonable doubt of the guilt of Mike Paterno or his company you will be required to find from the evidence or from thegovernment's failure to prove the evidence that he had knowledge, criminal knowledge of the

activities about which there has been all this "ooh-aha," and that he had the specific intent with respect to each one of the 8 crimes which are set forth in this indictment to commit those crimes; that his state of mind had to be such that he deliberately set about conspiratorily and substantively to cheat the government of taxes in which are now claimed by Mr. Buchbinder on the basis of his computation, which is exhibit 165, to be justly due and owing to the government.

We brought you a cross-section of character witnesses who told you about the reputation of Mike Paterno for honesty, integrity and compliance with law. You remember there was Brother Leo, who was the dean of the engineering school from which Michael Paterno was graduated. You remember there was his cousin, Carl Vigari, the district attorney of Westchester County, who came here to tell you about the honesty and integrity and compliance with law reputation of Mike Paterno. And then finally there was a businessman with whom Mike Paterno had done business for some 12 or 13 years, George Kerr, who likewise testified to the same effect not only before the filing of this indictment on May 3 but since that date as well.

Ladies and gentlemen, the duty to make this determination is yours and I am satisfied that you will make

it in accordance with your conscience and your oath and that when you do you will reach but one single, inexcapable conclusion, that Mike Paterno and his Company are not guilty. Please don't compromise. If he is guilty, say so. If he is not guilty, have no hesitancy in telling it to the world. Thank you.

THE COURT: We end somewhat tardily. If I may say so, without currying your favor, we all appreciate your getting here on time. I want to request that we plan to start at 9:45 tomorrow morning. It will be a moderately long morning. We plan to give you the case by lunch time. Please make every effort to be here by then.

Until tomorrow, when you will have ample opportunity to start discussing the case, don't talk about it. See you in the morning.

(The jury left the courtroom.)

THE COURT: I only want to keep you for a minute or two. I wanted to wait until both of you older fellows were completely through with your summateions before I said this, but now I want to say I have tried several cases with Mr. Brill, whose energy and resourcefulness always impress me. I think this is the first one you and I have had together, Mr. Rosenthal.

MR. ROSENTHAL: Yes.

THE COURT: In the case of Mr. Brill, I am really, with all respect to him, deathly sick of hearing about his old age and his infirmities and for your future guidance, Mr. Brill, I don't ever want to hear about them in your address to the jury again. If you are not competent toward this hard task of trial work, that is not something to consider with the jury. I have every confidence in your competence and I don't think that kind of personal reference is necessary or desirable.

I say the same thing to you, Mr. Rosenthal, for your future guidance. I don't know whether any of us old and wise people are better or worse or lovelier or not than these young and stupid people or whether they are smarter or we are dumber, but I really don't think that is the way to present cases to the jury. I don't want any more of it.

Now, I left with you gentlemen three items, none of which seemed to me to be of earth-shaking importance, frankly, but they were generated by objections of Mr. Silverman and I indicated that I would direct you to pursue them. I remind you that one concerns the question of who was right as to Mr. Burke's knowledge or lack of knowledge respecting truck brokers, something that came up in connection with Mr. Rosenthal's summation.

Secondly, what, if anything, the evidence allows

a jury to find about the pertinent kinds of distortion, if any, resulting from enlargements of things by photographic procedures, again a matter that arose during Mr. Rosenthal's summation.

And finally some argument that I must confess seemed less important to me than even the other two, which concerned the point about when Agent Rizzo came up with the questioned trucker's names. This came up in Mr. Brill's summation and I directed counsel to make a note of it, and my directions on that subject are simply as follows: I think you all ought to check the record and anybody who has and desires to have me convey to the jury direct information in the morning may supply it. If there are any disputes about it I will undertake to resolve them. If there are not, I will give the material.

If all of you agree that any or all of these matters, after you have slept on them, are not worth bothering with, I will allow you to handle it in that way. I leave it, in short, to the judgment of counsel subject to the things I have just said.

In order to try to accommodate the jury, which has been treating us considerably, I think we ought to get together at 9:40 a. m. so that any of this that needs to be covered can be covered. Maybe five minutes is insufficiently

generous. Do you want to make it 9:30 or 9:35? I don't care. Does anybody have a view on that?

MR. BRILL: Anything your Honor says.

MR. ROSENTHAL: I didn't get the second item.

MR. BRILL: The photographs.

THE COURT: As to the distortion that comes with enlargements.

MR. BRILL: With respect to the one item concerning which your Honor addressed himself to me, I thought and I don't want to make a big thing about this, that I said it was not my recollection but the jury's recollection which governed and I don't really see that there is much value to the investment of time in going through the record for that purpose since your Honor will in the end tell the jury that its recollection governs and not anything that I say or Mr. Silverman says or which my colleague, Mr. Rosenthal, says.

THE COURT: The formula by which we delegate this duty and responsibility to the jury is comfortable and acceptable except when it is made too much of a virtue. Mr. Rosenthal must have said 25 times, if he said once, that he is not sure and he really doesn't remember but he thinks maybe it is so and so, and I must confess that in a number of those instances his recollection was quite different from mine, and there comes a point where putting that kind of

burden on a jury seems to me to be undesirable. It is true the other side can try to correct it, but then you have a dispute. I think it can be overdone.

I didn't write any of this down, but one thing comes to mind that Mr. Rosenthal said. He said he thinks, in one instance, that two or three months elapsed between the date of the invoice and the date of the check. I have a vivid memory of that being more like 8 or 9 months.

MR. SILVERMAN: Eight to 10 months.

THE COURT: I don't think whether you do it at 5 in the afternoon or whether you are old or young or sick or well you ought to be allowed to do too much of that before a jury. I don't like to have a jury with a 1400 page record spend the rest of the week after they are charged trotted back into the courtroom to have the transcript read at them. I think it is the duty of counsel to keep to the barest minimum those little factual slippages that occur with all of us. It is also the duty of the judge and I think now that you press me, Mr. Brill, that it was no so in your case, but that it was excessive in Mr. Rosenthal's case, and it was his duty when he knew, as he finally acknowledged, that he was probably going to be summing up today to get those facts organized and not just have vague recollections of them, especially when they may be important like the dif-

ference between two months and eight months and ten months or three months and eight months and ten months. Those are things that a lawyer, especially a lawyer of your seasoning, both of you, keeps in tow as he goes along and doesn't at 5 a. m. suddenly realize that some facts were involved in a case.

I am not going to push it, but I am going to allow either side to do it. From your attitude it may mean that I am going to allow Mr. Silverman to push it if he wants corrections as to those three things with respect to which I made a particular reference in the presence of the jury. He is entitled to have them provided he can substantiate his views on the record.

As to the other things, of course, he can just use his last summation to rebutt and he can quote the record, of course. But I take it you understand the drift of what I have said and I do think we have a duty, as I said, to minimize this kind of casual dealing with an evidentury record: I don't really remember, I'm pretty old, I'm kind of sick, it has been a long day, trial work is very hard.

For heaven's sake, there really comes a point where one does not wish to hear that.

MR. BRILL: I didn't say --

THE COURT: You didn't say all of those things,

Mr. Brill?

MR. ROSENTHAL: On the record, your Honor, I most respectfully take exception to your Honor's remarks. Mr. Brill and I worked until 10 o'clock last night attempting to formulate a hypothetical question that we hoped and believed would be approved by the court, and that question through with, we then had to prepare and go over the facts with the subsequent witness who had been called after Mr. O'Connell's testimony.

I may have been pessimistic, I don't know, but I began to wonder if your Honor would allow the hypothetical question that I with all respect to the court believed and do believe was a proper question and with that on my mind, I did get up at 5:30 this morning and started working on my summation or at least attempted to block it out.

I was not in any position at that time to begin to quote chapter and verse. I did attempt to paint with broad strokes, and I don't question that. I may have made errors. If I did it was not deliberate, believe me. I say that for your Honor to criticize under these circumstances where your has repeatedly made statements before the jury that would tend to indicate your belief of the guilt of the defendants and where your Honor has insisted that we sum up this afternoon, giving the government the privilege of

having a full day after summation to give its summation, I think that the criticism of Mr. Brill and myself, and I am primarily speaking for myself now, is improper and I most respectfully state that.

THE COURT: I don't want to continue this debate. I want you to have the last word on every subject but one. If I believed that I had expressed to the jury my belief in your client's guilt I would, of course, grant a mistrial, but the record will show that one way or another and I see no need to pursue that any further.

Let's meet at 9:35 on the three open questions.

Do you have something else?

MR. SILVERMAN: No, your Honor.

(Trial adjourned until February 21, 1974 at 9:35 a. m.)

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2 UNITED STATES OF AMERICA

3 V.

4 PATERNO & DENTI

5

6 February 21, 1974
9:45 a. m.

7

8 (Trial resumed.)

9 THE COURT: We had three open questions or
10 possibly open questions. Let me hear from counsel on that.
11 MR. SILVERMAN: Yes, your Honor. In reference
12 to Mr. Burke's testimony I would like to refer the court
13 to page 561 beginning on line 21 and continuing to page 562,
14 line 11.
15 THE COURT: And that shows what?
16 MR. SILVERMAN: That shows, your Honor, that Mr.
17 Burke said that he is not aware of truck brokers and that
18 they are not controlled or under the auspices of the
19 Compensation Board, in substance.
20 THE COURT: Is it necessary or desirable after
21 reflecting on it overnight, Mr. Silverman, to bring that to
22 the attention of the jury? I ask you that question in that
23 way because it seems to me in perspective it becomes a
24 rather trivial matter.
25 MR. SILVERMAN: All right, your Honor.

THE COURT: Is that agreed by both sides or do you want me to say something about it, Mr. Rosenthal?

MR. ROSENTHAL: I didn't raise the issue, your Honor.

THE COURT: I know, but now that I raised it are you willing to let it drop?

MR. ROSENTHAL: I think if you continue reading on page 562 you will see that my statement to the jury was a proper one.

THE COURT: I am asking both of you --

MR. ROSENTHAL: I have no desire that anything be done with respect to the jury with respect to that statement.

THE COURT: The second question was as to the matter of enlargement of photographs.

MR. SILVERMAN: Yes. I refer the court to page 908, lines 3 through 15.

THE COURT: All right. My ruling on that is, the subject being heard further, that it is probably sufficient to let you, if you wish, read that to the jury rather than have me read it to the jury. Is that agreeable?

MR. SILVERMAN: I would prefer the court do it, but if that is the court's ruling that is what I will do.

MR. ROSENTHAL: I submit, your Honor, that from

a reading of that testimony that my statement to the jury was justified that that is an inference that they could draw from the reluctant testimony of the government expert witness.

Your Honor will recall the manner in which he testified on cross-examination and how grudgingly he gave any information that was requested of him on cross-examination.

THE COURT: I do not have a similar view of his testimony, but that is not important. I will read lines 3 to 15 to the jury in connection with that subject.

Then there was a matter that also seemed to me to have diminished in consequence overnight, but maybe I don't understand its full import. I have reference to the business about Rizzo and when these questioned names came up. But I will hear counsel.

MR. ROSENTHAL: That didn't concern me, I don't believe.

MR. SILVERMAN: I have the lines that I referred to. I believe also that it would cloud the issues of this particular point to pursue it and I am willing to withdraw my request that I previously made yesterday.

THE COURT: Is that agreeable to you?

MR. BRILL: It is, your Honor. I have no objection to his withdrawal of his objection.

THE COURT: I will read this one passage about the photography and then Mr. Silverman may proceed to his summation.

Why don't you just all relax then until the remaining two jurors arrive and then we will proceed with Mr. Silverman's summation.

MR. ROSENTHAL: Your Honor, am I correct in understanding that you will read from line 3 right through to line 15?

THE COURT: Yes.

Mr. Swanciger will let us know when they are ready and we will proceed.

(Recess.)

(Jury in the box.)

THE COURT: Good morning.

THE JURORS: Good morning.

THE COURT: You remember during the course of the summations yesterday there were a couple of occasions when there were objections and some discussion about things that we might consider overnight and mention to you this morning.

In the light of day the general decision has been to leave those disputed subjects to you for your resolution because they are primarily for your judgment on the evidence, except that it was agreed that with respect to one of those matters, which is not going to be terribly major, I would simply read to you a certain portion of the record.

This concerns some disagreement yesterday about what was in the evidence concerning the effect of the enlargement of something photographically. I am going to read to you a portion of the cross examination of Mr. Oberg, the FBI handwriting expert:

"Q When you enlarge something 4-1/2 times you tend to have some distortion, don't you, sir?

"A Well, [illegible]

the lines are straight. We do not have that distortion

of which you speak.

"Q You have none whatsoever?

"A If it is, it is very, very slight. I couldn't detect it.

"Q And no matter how slight the distortion is it is magnified four and a half times, isn't it, by reason of the scale being four and a half?

"A No, that would be a resultant distortion. It wouldn't be magnified 4-1/2 times."

Those are the lines that counsel and I agree should be read, from page 908 of the transcript.

Now we are ready for Mr.Silverman's summation.

MR. SILVERMAN: May it please the Court, Mr. Rosenthal, Mr. Brill, Mr. Ehrlich, Mr. Foreman, ladies and gentlemen of the jury:

The purpose of my summation is to review with you the evidence that the government has presented in this case. I am not going to spend the time that is allotted to me arguing the various points that were raised by the defendants yesterday.

I hope in my summarizing of the evidence I will cover all the points that they brought out yesterday in their summations.

I would like to submit for your consideration a

little story that I believe would properly characterize the summations of both the defendants.

When I was in law school there was a professor who was quite a scary sort of individual. He had been in the school for some 40 years --

MR. BRILL: Isn't this, your Honor, exactly what your Honor advised us not to do?

THE COURT: This is what I advised you not to do next time, yes, Mr.Brill. Go ahead, Mr. Silverman.

MR. SILVERMAN: And he would require the students in the class to get up and recite on a particular case that he felt was important at the time. And after the student would get up and recite on the case he would lean forward over the podium -- he was the only one standing in a group of about 120 people -- and if your recitation was not accurate and your insight into the law was not what he expected it to be, he would lean forward -- he would look at you and he would say in front of the 120 other students while you were standing by yourself, "Mr. Silverman, your recitation was like the weather: It was cloudy."

I submit to you, ladies and gentlemen, that is just what the summations of the defendants were -- cloudy. It is for you to decide.

Now what has the government proved in this case?

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It has proven that in the course of an audit by Anthony Rizzo he came across some 48 checks which he later found out were all cashed -- none of which was deposited.

Now when he found these checks, I believe it is quite clear -- and I believe it is quite clear to you when he brought it to the attention of the defendants -- now whether there were at that time tomatoes blooming, whether they were ripe or whether there were flowers I do not believe is of any importance in this case. The importance in this case, ladies and gentlemen, is that he found those checks, and those are the checks that are in issue in this case. The checks were made out to five different payees whose names have been repeated ad nauseum in this courtroom the last two weeks -- I am sure you know this better than I do.

39 of the checks were cashed at a bank, the Royal National Bank, which was the bank of the defendants, Paterno & Sons, Inc., the corporation. It was not the bank of any of these five payees.

The bank people testified and none of them could recall -- some of whom had been at the bank over 20 years -- any clients by those names at that bank.

[illegible] bar in Manhattan -- a place called Vin Rao's Bar and Grill.

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Not one of the five payees went there to cash the checks but three of the payees -- payees from Long Island, the city -- went to one bar in Manhattan which, incidentally, cashed their checks.

I ask you to draw upon your experience as to whether or not they cashed their checks or whether they deposited them to their business accounts.

Now with reference to the invoices that we found, the invoices had on them addresses and telephone numbers.

In a stipulation, which means that it is not contested between the prosecution and the defense, three of the addresses never existed. According to the testimony of the mailmen,one of the addresses, 800 Jericho Turnpike doesn't exist either. There is an 800 East and 800 West but there is no 800 Jericho Turnpike.

The only address which was in existence, the mailman testified there was no one by that name at that address during the whole period that we are talking about. So I do not believe there should be any question in your minds, ladies and gentlemen, as to whether or not these people existed at those addresses.

Then on the same invoices we had telephone numbers, and we found that two of the telephone numbers were subscribed to for over ten years by two other people.

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We also found -- and this is by stipulation -- that the other three numbers were either unsubscribed during the period in question or they were subscribed by other people, so I do not believe there should be any question in your minds about these people -- these five people and these five telephones.

So now we have people without addresses and without telephone numbers. That is where we stood.

Now it is the burden upon the government to prove that these people don't exist. As I said to you in the opening, we cannot bring someone in here to show that someone does not exist. It's an impossibility. The way the government set about doing it is to prove by whatever means, by whatever resources we found available, to try and check out whether or not these people did exist -- and that was our responsibility. That is the responsibility of the government, to prove beyond a reasonable doubt that these people do not exist.

Now Mr. Rosenthal characterizes this group of witnesses who he called "negative" witnesses, and he criticized the government for its thoroughness in how he went through dragging people from all corners of the [illegible] these people's non-existence, these payees' non-existence.

I consider that a compliment. I consider thoroughness a compliment.

We don't have to go through each and every one of these people. We had a person from the New York State Tax Department. He testified there was no record of any of these people. The gentleman from the Internal Revenue Service of the United States Government testified that there is no record of any of these people, and the gentleman from the Motor Vehicle Bureau and person from the New York Compensation Board. And then two men, one from each of the two locals in the jurisdiction that we were talking about.

Now, ladies and gentlemen, I submit to you, sure there are people who drive cars that don't have driver's licenses, and I submit to you ladies and gentlemen that there are people that earn money that don't file income tax returns, and there are people that have employees that don't pay workmen's compensation benefits.

Mr. Rosenthal stated that we set up strawmen and then knocked them down. Well, ladies and gentlemen, I submit to you there were no strawmen. There was no one to knock down, because these five people just don't exist. These are the facts. They just don't exist.

One of the witnesses was asked on cross-examination what if a resident of another state was driving in New

York State, could he possibly be driving with another out-of-state license in New York State? Ladies and gentlemen, if this building was the Eiffel Tower we'd be in France. There is no question about that. But this is the Federal Courthouse. We are in New York State. We are in New York City. This isn't the Eiffel Tower.

Mr. Brill said that I would use some fancy words like red herrings and words like that. Fortunately or unfortunately, I don't have them in my vocabulary.

Simply stated, ladies and gentlemen, I submit to you that the defendants through this whole case tried to confuse you and tried to mislead you and that the government in this case tried to bring the facts out the best we had them in the clearest possibly way.

An example of that is that when the gentleman from one of the locals came in here was asked by the government to search through his records and determine whether or not anyone by these five names either was a contractor, had a contract with that particular local or was an employee who either had benefits paid for him or who was paying benefits himself.

The defendant introduced exhibits X, Y, Z, AA and AB. These were cards that they asked this gentleman to bring along for the name Aurrichio. You recall, ladies and gentle-

men, that two of the names weren't even spelled the same way that the Aurrichio name was spelled on the invoice and none of the names had the same first name.

They also introduced defendants' exhibits AC through AG in reference to the name Lazravitch, except all the ones that came along with this gentleman were spelled with an "O" instead of a "A." None of them had the same name. They were all different names.

Was this to clear the issues or was this to cloud the issues, ladies and gentlemen?

They were asked questions about whether or not an individual who is working for a contractor had 30 days to join the union. The gentleman testified, I believe, that they do have that kind of a time period. Ladies and gentlemen, if you examine these invoices, which it is your opportunity to do, if you like, you will notice that these invoices cover a five-year period, which is far in excess of 30 days.

Was this presented to you to clear the issues or to cloud the issues? Was this for clarity or was this presented to mislead you?

Now, the government called several witnesses who were the employees of Paterno & Sons, Inc., either past employees or present employees, or people who were retained

by the corporation. Now, these are what I would like to characterize as what we call our bread and butter witnesses. These are witnesses who testified to facts that are within a certain person's knowledge, a bookkeeper, a job foreman, an accountant, these are people who know the facts, who were there at the time when it happened. We did not create these people. We were stuck with these people. These were the people that we had to use. These were the people that we had to call in order to prove our case. These are the people who have the inside knowledge of the books, of the bills, who ordered the trucks and how the jobs were run.

I submit, ladies and gentlemen, for your examination that these witnesses were far less than candid. Their memories constantly had to be refreshed.

MR. BRILL: I am going to object to this, if your Honor please.

THE COURT: Overruled.

MR. BRILL: I am going to ask your Honor to instruct the jury that when a party calls a witness that party vouches for the credibility of that witness.

THE COURT: I won't instruct the jury to that effect. It is not the law and your objection is overruled.

MR. ROSENTHAL: I respectfully ask your Honor to instruct the jury that it is their province to determine the

manner and the demeanor in which testimony was given by any witness.

THE COURT: Of course it is their province and it is the province of counsel, as all of you know, to argue what you think the jury should know with that responsibility.

Now, proceed, Mr. Silverman.

MR. SILVERMAN: Thank you, your Honor.

I submit to you, ladies and gentlemen, for your examination that if any time you want the record read to see whether or not something happened in the case, if your recollection isn't clear on a particular point, may do so. I believe you ladies and gentlemen will, upon your examination, find that these people's memories had to be constantly refreshed by being shown past sworn statements that they had made. Only then did they remember the things that they had to remember.

Let's look at them one at a time. First there was Mr. Bressler, the accountant, who testified that the company in question had grown during the years that he had been their accountant from about $400,000 a year to approximately three million a year. He was asked on direct examination whether or not since this whole investigation started, whether he had ever discussed the matter of the existence of the truckers with Mr. Paterno and Mr. Denti.

I would like to read to you ladies and gentlemen from page 110 of the transcript, starting on line 8:

"Q. Your testimony, Mr. Bressler, is that since the examination of the books and records started by revenue agent Rizzo until the present, you did not have a conversation concerning the existence of these truckers with Mr. Michael Paterno?

"A. On the contrary, I did have a conversation with him.

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"Q. And did Mr. Paterno at any time during the conversation discuss the existence or non-existence of these truckers?

"A. Not in those words, no.

"Q. Did he ever tell you they existed?

"A. No, sir.

"Q. Did he ever tell you they didn't exist?

"A. No, sir.

"Q. Did you ever ask him?

"A. No, I never questioned him about that."

I submit to you ladies and gentlemen that Mr. Bressler was being less than candid with you when he stated to you that during the last three years that the topic of the existence of these truckers, which is the whole issue in this case, never came up.

We then put on the stand a lady by the name of Anne Altro who was chronologically, it may be, the second bookkeeper. She succeededher sister Louise. She was asked how the receipts were attached to the invoices. At page 626, line 11, she states:

"Q After you filled out the cost sheets from the job folders you had the invoices. What, if anything, did you do with the delivery tickets for those receipts?

"A I would attach them to the invoice.

"Q And would they be stapled to the invoices?

"A Yes. If I did not have all of them I would put a clip on them until I got all of them.

"Q When you finally got all the delivery tickets from a particular job to a particular invoice would you then staple them to the invoice?

"A Yes."

Page 726 on redirect, 100 pages later;

"Q And is it true that on every occasion you gave a check to Mr. Paterno for trucking expenses there were delivery tickets stapled to the inovice?

"A Yes."

But then on recross Mrs. Altro stated, and this was a question by Mr. Brill:

"Q You have just been asked about the method by

by which you put the invoice, the back-up and the check. Mr. Silverman asked you if on every single occasion you stapled, as he put it, all the material -- the invoice, the back-up material, and handed it to whoever was signing it, with the check. Did you sometimes use clips?

"A. I said I did, yes."

Ladies and gentlemen, I would like to draw to your attention at this time Defendants' exhibits X-1 and I believe X-11. You could examine each and every one of these invoices. They are trucking invoices. All of them have staple marks, all of them are for existing truckers, all of them had delivery tickets attached to them at one time. They all bear staple ---

MR. ROSENTHAL: Your Honor, that is not -- there is no evidence to that effect and I say that that is not a fair inference to be drawn. These invoices have checks stapled to them today and there is no way in the world Mr. Silverman or anyone else can tell when those staple marks appear on those invoices and what was previously attached to them.

MR. SILVERMAN: The check in my right hand is not stapled to the invoice in my left hand.

MR. ROSENTHAL: In some instances I believe they were or had been.

THE COURT: There is physical evidence and you have both stated your positions on it and I will direct that these exhibits go to the juryroom with the jury and, of course, I will instruct you later on that any other exhibits the jury desires will also be sent into them while they are deliberating.

MR. SILVERMAN: I call to your attention the invoices, ladies and gentlemen, that were allegedly submitted by these fictitious truckers and ask you to examine the upper portion of these invoices, and you will find that there are more than one stapled together, one or two others, and that 80 percent of them, 8 out of every ten of these invoices bear no staple marks. The reason that they don't bear any staple marks, I submit to you, is because there never were any delivery tickets stapled to them.

Mrs. Altro was asked if she ever prepared a ticket ---excuse me -- a check where there were no back-up material, no tickets. At 637 she was asked at line 11:

"Q Mrs. Altro, I would like to ask you the question again as to whether or not on any occasion did you ever prepare any checks payable to truckers where there were no delivery tickets attached to the invoices?

"A I don't remember. I mean, I can't give you an answer."

Mrs. Altro was then given a paragraph from a memorandum that she swore to the truthfulness of before the grand jury, and this is at page 639, line 14 where the paragraph is read aloud in court:

"When asked by special agent Ayres if she was instructed by anyone to issue the check, she stated that she must have been since Mike Paterno would not sign a check without appropriate deliv ry receipts. She said that George Denti must have instructed her to prepare the check. She concluded that she did remember that on occasions George Denti would instruct her to prepare checks without delivery receipts and that he, George Denti, would explain the lack of substantiations to Michael Paterno.

"Now, is that statement true or untrue?

"A I have to give you a true or untrue? I don't remember.

"Q What is your best recollection?

"A Yes.

"Q Is it true?

"A Yes."

I submit to you, ladies and gentlemen, that only after being shown that statement did Mrs. Altro have to concede to you people that there were instances when there weren't any back-ups, weren't any delivery tickets, and those

invoices were the basis, ladies and gentlemen. Those invoices were given to George Denti and George Denti gave those invoices to Michael Paterno for him to sign those checks. She prepared those checks but as she finally admitted, ladies and gentlemen, there were occasions when there weren't any back-up material.

Now, remember, she was asked how the bills were paid, what the order was, who selected the order for the payment. She couldn't remember. She couldn't remember who picked out which bills to pay first. Three or four people worked in that whole office and she couldn't remember who selected the order of payment.

I submit to you ladies and gentlemen that you saw her when she was "being cross-examined" by Mr. Brill. She was very ready, very ready to offer information and to volunteer any information that was requested.

I submit to you ladies and gentlemen for your examination as to why she was so reluctant on direct examination by the government and so free with her answers on cross-examination.

She was asked if she could recall the names of any of the truckers who worked with Paterno and Sons Inc. She said she remembered Taff, she remembered La Spina. The reason why she remembered them is because they worked for

Paterno & Sons, Inc. She was asked about the five. She didn't say no. She said "I don't remember." "I don't remember" was her best.

But she couldn't recall calling them and she couldn't recall receiving calls for them. It was a complete blank as to that, but as to the questions asked by the defendants she was quite clear, quite fluent, and the area was brought up on how quickly these truckers were paid. She testified that on occasions when truckers were not paid and wanted their money they would call up. What she would do is that she would go to George Denti and tell Mr. Denti that Mr. so and so had called and was asking for his payment, and she said that the general practice of the firm was to pay within a week or two weeks. That was the general practice.

Now, the defendant showed a group of bills and invoices and checks that ranged as much and as great as, I believe, and you can examine them -- I believe ten weeks was the longest. We will call that 70 days, to be fair. Ladies and gentlemen, if you examine the invoices and the checks that were in payment of inovices you will find that there are some invoices in here that took as long as ten months to be paid. Not two months, not three months, but ten months, three hundred days and nobody called, nobody

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called requesting their money.

I submit to you, ladies and gentlemen --

MR. BRILL: Your Honor, I object to that last statement because I don't believe there is any proof that nobody called.

THE COURT: I think Mr. Silverman is asking the jury to infer that from whatever testimony there was and it will be up to the jury to decide whether that is or is not a fair inference.

MR. SILVERMAN: Ladies and gentlemen --

MR. ROSENTHAL: If your Honor please, I submit it cannot be a fair inference from the testimony unless this particular invoice was during the period that Mr. Altro was there, because it is relying on her testimony that people called for checks that --

MR. SILVERMAN: The testimony of Mrs. Altro was that she prepared the check and she was shown those two checks.

THE COURT: If she did prepare them, then that takes care of your objection, Mr. Rosenthal.

MR. ROSENTHAL: I don't know about the particular check he is talking about, Judge. These invoices are during the period of four or five years.

THE COURT: Tell us about the check that was 10

month or whatever it was after the date of the invoice. Was that during Mrs. Altro's tenure?

MR. SILVERMAN: Your Honor, exhibits 24A and 25A and the checks that were issued in payment of those invoices were both prepared by Mrs. Altro.

THE COURT: All right, go ahead.

MR. BRILL: I invite your Honor's attention to page 661 where it refers specifically to calls from truckers requesting payment in the course of the testimony of Mrs. Altro?

THE COURT: You don't have to invite my attention to read it.

MR. BRILL: All right, sir. I will read from line 2:

"Q Do you recall making an envelope out to Arthur Lazarvitch?

"A No.

"Q Do you recall making an envelope out to Thomas Tuccella?

"A No.

"Q Do you recall any mail being returned to Paterno & Sons, Inc. that had been addressed to any one of those five individuals?

"A No.

"Q Were there ever occasions" --

THE COURT: You are reading a lot of things. Your objection was that Mr. Silverman was making an improper argument when he said there was no telephone call.

MR. BRILL: If I had not read the preliminary there would be a criticism that I had not read what preceeded it. That is what I took the precaution of doing and now I am coming to what I mentioned, your Honor.

THE COURT: I see. Go ahead.

MR. BRILL: "Q Were there ever occasions when these checks were not mailed?

"A Yes.

"Q What would be the circumstances in those cases?

"A Well, the truckers might be coming to the office and we would hold it until he came or someone would take it on the job and give it to them.

"Q Did you ever receive any calls from any truckers requesting payment?

"A Yes.

"Q What would you do in a situation where a trucker would call up and request payment for services he had performed?

"A I would tell George that he had called."

THE COURT: The ruling stands. I hold that the argument which objection was made is within the permissible range of argument and the jury will draw the inferences which are its responsibility from all of the evidence, including what has just been read to them.

Go ahead, Mr. Silverman.

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MR. SILVERMAN: Thank you, your Honor.

This leads us to another part of the case, in trying to determine -- trying to decide, in looking at these people's testimony as to whether these were large companies or whether they were small companies.

Were these large truckers who did business with Paterno & Sons, Inc. the five individuals, or were they small companies? I submit to you, ladies and gentlemen, that if they were small companies they couldn't wait ten minutes --

MR. BRILL: I am going to object to that because there is absolutely no proof about the size of these companies. This is pure speculation lifted out of excavated material in left field.

THE COURT: Overruled.

MR. SILVERMAN: If they were small companies, ladies and gentlemen, I submit to you for your examination that these people could not have waited ten months, and if they were large companies, ladies and gentlemen, I submit to you we would be able to find them.

There is one point that has not been brought to your attention that is right here in these books (indicating) -- these right here (indicating). The defendants have the other purchase journals -- the journals and ledgers

that contain all the entries on the facts that we are talking about, ladies and gentlemen.

Now it was explained to you early in the case that the defendant corporation is on what we call an accrual basis rather than the cash basis. On the accrual basis, when you receive a bill from someone who did services for you you are allowed to take it at that moment on that particular day as an expense. You do not have to wait until you pay the check.

Now, ladies and gentlemen, I would like you to look in these books (indicating). I would like you to look at folio page 486.

On page 486 there is an entry for November 30, 1969, an entry of a bill received from Mr. Ferrotta, one of our lucky five -- Mr. Ferrotta.

The entry is for $4,115.86.

Now I would have you ladies and gentlemen conclude that from 11/30/69 until the beginning of this trial, where these books go up to, is longer than ten months -- longer than three years, longer than four years. Ladies and gentlemen, you could search high and low in these books and there is no payment of that bill to Mr. Ferrotta. Mr. Ferrotta, wherever he is, is satisfied in billing the corporation for over $4,000 and not being paid.

MR. BRILL: Your Honor, I object to that because it is not a matter which is at issue in this case with respect to whether or not proper deductions were taken. That is the issue.

THE COURT: You know, I have ruled on that in receiving the evidence.

MR. BRILL: Yes, sir.

THE COURT: That is overruled.

MR. SILVERMAN: I submit to you, ladies and gentlemen, when you examine the books at page 440 -- that is, folio page 440, you will find an entry of 5-15-69 --

MR. BRILL: May I have the exhibit number, if your Honor please.

THE COURT: Do you have it there, Mr. Silverman?

MR. SILVERMAN: I just have the folio page. I do not know how the defendants numbered these exhibits. These are defendants' exhibits.

THE COURT: Which book is it?

MR. SILVERMAN: These are the purchase book, your Honor.

THE COURT: All right, it is the purchase book, Mr. Brill. It is your exhibit.

MR. SILVERMAN: Now on 5-15-69 there was an entry made of $2,309.62 to Mr. Lazravitch.

Ladies and gentlemen, you can search high and low through these books and you will find that that bill has not been paid. Mr. Lazravitch does not want his money. Now whether he was General Motors or whether he was a man with one truck, ladies and gentlemen, I submit to you that if that expense was incurred by the corporation, Mr. Lazravitch would be banging down the door asking for his money.

MR. BRILL: Your Honor, I object to this as unfair argument on the ground that in view of the explanation that this was on an accrual basis, the expense is deductible in the period, the fiscal period in which the bill is received, and beyond that it would be immaterial and not relevant.

THE COURT: The timing of the deductibility of the expense is no part of the argument that Mr. Silverman is making. He is referring to the fact that there is no indication of payment.

The objection is overruled.

Please proceed.

MR. SILVERMAN: Ladies and gentlemen, one of the other witnesses who testified was a former employee, a young lady by the name of Louise Ferraro. Louise Ferraro testified that she recalled how the bills were selected.

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She recalled that she would prepare a list of all the outstanding expenses. She is the same person who trained her sister Anne, and she recalled that when she worked there she would prepare a list, and she would submit this list to Mr. Paterno. He would select from that list which expenses were to be paid.

She stated that she had a conversation with Mr. Paterno in which Mr. Paterno admitted and told her that these truckers existed.

She testified that she also had a conversation with Mr. Denti. Mr. Denti told her that these truckers existed.

And there was a young lady by the name of May Nunkin. May Nunkin is a young lady who maintained that Rolidex, the one that had the truckers on them. She remembered that Mr. Minichino and Mr. Laspina, they were on that Rolidex but she contended, she stated she never heard of the five truckers that we are talking about.

She was questioned about whether or not she had ever seen Michael Paterno either signing checks or requiring substantiation --

THE COURT: Mr. Silverman, we have a request for a brief recess. I do not like to interrupt your summation but we will take five minutes.

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Take five minutes, ladies and gentlemen.

(Jury left the courtroom.)

THE COURT: Let us all stay together for a minute.

Mr. Brill, some of your many objections in summation border on the frivolous. I am so stating to you for your guidance, and I want you to pay attention to that and see to it that when you interrupt it is for reasons that you can genuinely certify as being justifiable.

I do not think, on any reflection, that you are going to be able to do that on the last few, but I give you my judgment on that, and I request that you be guided by it. That is not the reason I called the recess, let the record show. I call it the recess because alternate juror No. 3, by whatever sign language is used for such purposes, indicated to the clerk that she wanted to go to the bathroom, but the occasion is also one to be used for this purpose to guide all of us.

MR. BRILL: May I respond to your Honor?

THE COURT: You may.

MR. BRILL: Thank you, sir.

I did not make what I consider to be a frivolous objection at any time during the course of Mr. Silverman's summation. I thought I advanced reasons which I sincerely and genuinely believed to be a solid basis for them.

It is unfortunate that we are in disagreement, and I, of course, have no alternative but to comply and to abide by your Honor's rulings.

But if your Honor is indicating to me that I should not make objections if I believe they should be made, then I am in a very difficult posture. I do not think that that is what your Honor intends I should do.

THE COURT: No, I do not think you think to that, Mr. Brill. Your abilities to comprehend accurately could not possibly have permitted such a misconception.

What I said to you I said to you. I gave you my judgment, sincere or not, that you have attempted to make some frivolous objections, and I said to you on the record, he who runs or walks may read and determine which of us is correct.

Now I want you to be guided by this, because I must rule on these objections, and I think it is in the interest of your client as well as orderly procedure in this court that you not make an excessive number of objections that get overruled.

I will instruct the jury that it is not a game and it is not a contest, but you have been at this non-game and non-contest long enough to know that these constant interruptions don't help anybody unless they seem to be

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substantial and weighty.

I am giving you my judgment as an outsider that they do not have the appearance of weight, and however sincere you are you might want to take that into account and reflect.

I have not directed you or any other lawyer in this courthouse at any time to refrain from objecting, in the presence of the jury or its absence. On the contrary, I made a particular point of inviting all of you to object when you have objections before the summations begin. I renew that invitation, and I renew the suggestion to you and hope you will be guided by it.

I do not want to discuss it any more.

Is the jury ready?

THE CLERK: They should be.

(Jury in the box.)

MR. SILVERMAN: May I proceed, your Honor?

THE COURT: Yes, Mr. Silverman.

MR. SILVERMAN: Referring to the testimony of May Nunkin, she was questioned at page 980, line 4:

"Q Did you ever hear Michael Paterno requesting backup material for the checks that he was signing?

"A Yes, he would ask for some substantiation, yes, sir.

"Q And what would happen? Was there a situation

where a check was presented to Michael Paterno where there was no backup or substantiation, where you were present?

"A Not where I was present, no."

Then she was asked at Page -- the same page, to read her grand dury testimony, and after reading her grand jury testimony, on page 981, line 12:

"A If he didn't have backup or a substantiation 9 times out of ten he would start yelling for it, he won't sign it because he has nothing to substantiate it one way or another."

That I believe, ladies and gentlemen, characterizes Mr. Paterno's responsibility or position with the firm -- he would not sign any checks without substantiation.

The only ones that he would sign without substantiation were the checks in payment of these invoices (indicating), which I submit to you, ladies and gentlemen, that he knew, along with Mr. Denti -- both of them -- two peas in a pod -- he knew that these truckers did not exist, do not exist, and never existed.

We called as a witness a man by the name of Sal or Salvatore or Teddy Minichino. Mr. Minichino is a person who runs what is now known as Taff Trucking He operated for awhile under his own name. It came out that Mr. Minichino

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still works for them, still does business with Paterno & Sons, Inc.

He testified that the first job he worked on was the Watson Avenue job.

He said he also worked at the Johnson Avenue and the Cedarhurst job.

He also testified that he never worked out of the New York area -- meaning the five boroughs and Long Island.

Now that is important, because Mr. Minichino was one of the people who supposedly had hired these five people, these five truckers.

Well, you remember -- and it is your recollection that controls -- that the Carmel job came before the Watson Avenue job. Mr. Minichino was not working at the Carmel job. The first job he worked on was the Watson Avenue job, so how could he have hired Aurrichio and Lazravitch for the Carmel job a year or two before he ever started woriing for Paterno & Sons, Inc.?

And a place where he calaims that he never worked?

He claims he only worked in the five boroughs, in the local jurisdiction of 282. He never worked upstate, in Westchester, in which Local 456 has jurisdiction.

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He was asked whether or not he hired any of these five people. He said he did not. He said he did not hire these people.

But on cross examination he was asked if he could recall the names of all of the truckers that he had ever hired.

Ladies and gentlemen, I submit to you that is an impossibility. No one can remember the names of everybody in every category that they have ever been involved in.

Ladies and gentlemen, if I asked you people who may or may not be sports fans, if you could name for me the names of all the people on the Brooklyn Dodgers I am sure that you couldn't.

If I asked you "Do you recognize the name Campanella?

"Do you recognize the name Robinson.

"Do you recognize the name Furillo?

"Do you recognize the name Snyder?"

Those names all sound familiar to you. If I asked you off the top of your head to name all the names of people who were on the Brooklyn Dodgers I wouldn't expect you to remember -- you wouldn't expect anyone else to remember.

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But when the names are thrown at you then you might be expected to remember -- especially the names of people you had hired -- especially the five names -- not being able to recall one of them.

He was asked several names, as to whether he could remember. He was asked about a Cathcart, about a Ted Murray, about a Ravin Brick, of a Phil Ferrara. He said "Yes, I remember all those names. Those were all people who I hired."

But if he was asked whether he had ever hired or did he ever hear of or did he ever know any trucker by the name of the five truckers we were talking about, he said "No" -- not that "I can't remember", but he said "No".

He also testified that the largest time period that he had to wait, as best as he could recall, was 60 or 90 days.

Now the next gentleman, the last of the so-called employees, if we can put them in that category, was Mr. O'Reilly -- James O'Reilly, the superintendent.

Now Mr. Rosenthal described Mr. O'Reilly as a man who is not comfortable in this courtroom. I submit to you, ladies and gentlemen, for your examination as to why Mr. O'Reilly wasn't comfortable in this courtroom.

It wasn't because he was wearing a suit. You heard him testify. You evaluate his answers. You evaluate his demeanor. You evaluate his candor -- who wouldn't be comfortable giving the type of testimony, ladies and gentlemen, that you heard from Mr. O'Reilly?

The first time, ladies and gentlemen -- and it is in the record -- that Mr. O'Reilly and I ever met was in this courtroom. It was the first time I ever asked questions of him. It was the first time he ever answered any of my questions -- and you were witness to that first conversation.

It is also in the record that in the past, before this matter started, Mr. O'Reilly was represented by Mr. Brill.

Mr. O'Reilly at page 1165, lines 5 to 16:

"Q. During the period of 1965 to 1969, during that period, did you ever order any trucks through Mr. Taff?

"A. I don't believe so, no, not in the sense that we do now; in other words, we order all our trucks through him.

"Q. I asked you, sir, whether you ordered all your trucks.

"A I may have ordered one truck from him, but, I don't know.

"Q My question is, on a continual basis during the years 1965 through 1969, didoyou order trucks through Mr. Minichino?

"A I would say no."

Ladies and gentlemen, later on in my summation I am going to refer to Mr. Denti's testimony. Mr. Denti stated that he never hired any of these people. He never heard of them. He doesn't know them, never saw them, never met them.

Mr. O'Reilly, nor Mr. Taff -- Mr. Minichino or Mr. Laspina -- they are the ones -- they are the men who hired these five truckers. Mr. O'Reilly said he did not. He said Mr. Minichino did not. Mr. Minichino says "I did not do it. Somebody else must have done it."

Well, ladies and gentlemen, I submit to you that if none of these people ever hired these people, these truckers were never hired -- I mean they were never hired for one reason, ladies and gentlemen, because they just don't exist.

You will recall Mr. O'Reilly's testimony on that check, which I will get to in a few minutes, which bore his signature and Mr. Denti's signature. It was cashed at the same time as one of the fictitious checks were cashed at the Royal National Bank -- the same old bank.

First he gave us some kind of explanation when the bank was across the street, he used to sign his check and Mr. Denti used to sign it, and Mr. Denti used to go across the street and cash his check. That was at City Island.

Mr. O'Reilly said something -- and correct me if I am wrong -- about having to drive about 20 minutes to get from the City Island office to the Royal National Bank.

I submit to you, ladies and gentlemen, he was being less than candid with us with reference to who cashed that check.

He also testified that all the trucks came from that area and as for the Carmel job, which is also upstate, he believed that some of the trucks came from the Bronx, from the city.

Well, ladies and gentlemen, the invoices of Aurrichio and Lazravitch show they are from Long Island. How did they get there? He drove from Long Island upstate and back each day?

He was also asked, ladies and gentlemen, as to whether or not he ever had any conversations with Mr. Denti or Mr. Paterno concerning the existence of these truckers.

On page 1204, line 2, ladies and gentlemen:

"Q Now, since that time that you were first questioned

about the names of these truckers, did you have any conversation with George Denti about the existence or non-existence of these truckers?

"A" -- one word -- "No."

Ten pages later, ladies and gentlemen, at page 1214:

"A Mr. Denti said that it was about truckers who they are saying were not there, and this is after I came from Mr. Ayres and Mr. Rizzo's office, and I said that 'Well, they said they were non-existing people'"

"Q Who is 'they', sir?

"A Well, Mr. Ayres and Mr. Rizzo.

"Mr. Denti said "They are existing people".

"I said 'I don't remember any of those names'.

"He said 'But they are truckers and they are existing people.' And all that."

I submit to you, ladies and gentlemen, that on page 1204 he said they never had a conversation with him but on page 1241, finally after being pressed, after being pushed, after being forced, having to testify to the truth, he finally admitted that he had discussed the matter with George Denti, that George Denti said they existed and that he told George Denti at that conversation that he never heard of these people, he did not know these people but

supposedly he was to understand they had ordered them.

Ladies and gentlemen, we also called three other truckers -- Mr. Capossela from B&C. He parked his trucks at the Carmel site. While he was working there he saw no other trucks parked at the site. He parked his trucks there because he did not want to drive his trucks from Westchester back and forth to the site at Carmel. He gave the explanation as to the expenses, and that is for your perusal -- I don't want to get into it; but these people from Long Island, they drove from Long Island -- Aurrichio and Lazravitch on each day.

MR. ROSENTHAL: Your Honor, let the record show that substantially the statement by Mr. Silverman, there is absolutely nothing in the record on that.

MR. SILVERMAN: Your Honor, I believe it is fair argument, if the trucks were not parked at the site, it is fair argument that they would have to drive back and forth from their office which is on the invoices.

THE COURT: Is that your argument?

MR. SILVERMAN: Yes.

THE COURT: All right, I will leave that for the jury, with your observations, Mr. Rosenthal.

MR. SILVERMAN: There was some question made as to Exhibit 108 as not properly reflecting the expenses

that he billed Paterno & Sons, Inc., but I think Mr. Capossela adequately brought out that he did not use this book for his billing; that the billing that he made was from the delivery tickets; that the delivery tickets in fact did exist, and the delivery tickets that were required from all truckers, Exhibit 65.

Then there was Mr. Cimino from Cross County. Well, Mr. Cimino admitted to a very serious crime. He admitted that he had put the name of his truck, the ownership of the truck in his sister or sister-in-law's name so that he would be able to work and drive his own truck. What a dastardly act he committed! -- wanting to work to earn a living to get around the rules.

Then there was Mr. Laspina. Mr. Lapsina testified that he worked at the Watson and Cedarhurst and Johnson Avenue jobs. He never worked at Carmel. He did not work outside of the city; he only worked in Local 282.

He said yes, on direct examination -- he said, he did hire -- he did hire people who worked for Paterno & Sons only on one occasion, the Johnson Avenue job, and that was Lanza Brothers.

And if you look through the bills that are part of the defendants' exhibits, you will find Lanza Brothers' bill here, because Lanza Brothers did exist. Buthe said

he never heard of the other truckers and he never hired them.

Well, if Mr. Laspina and Mr. O'Reilly and Mr. Denti and Mr. Minichino -- none of these people hired these trucks, well, who did hire them?

Then we produced as the last trucker, as part of our burden, the real -- and I use that term loosely -- the real John Aurrichio. He is the one referred to by the fellow from the Department of Licenses that had his driver's license, and the fellow from the New York State Tax and the Federal Tax -- he is the fellow who lived at 25 Buckingham Drive in Dix Hills.

Mr. Aurrichio had at one time, under the name of Aurrichio and Tuccillo, worked for Paterno & Sons, Inc. -- a long time ago -- away before these matters ever came about.

I submit to you, ladies and gentlemen, that you may conclude from that name that that is where they picked up the name John Aurrichio.

Then there were the bank personnel, ladies and gentlemen. They testified to three basic areas: Cashing of the checks. They were all cashed; on what basis the rules and regulations of the bank required identification from payees; and the conversations that these bank officers

had with Mr. Paterno and Mr. Denti.

There was no question that all the checks that were negotiated at this bank were cashed.

There is no question that none of the payees listed on those checks, none of them had accounts, none of them were clients at that bank. In each instance Mr. Andretta and Mr. Hoffmann testified, prior to cashing these checks, approving these checks for cashing, that they received a call from Mr. Denti.

I believe Mr. Andretta testified that on one occasion he had called Mr. Denti after the payee came to the bank, and other than that one occasion, on all other occasions he testified that he received a call from Mr. Denti giving him the name of the payee, the amount of the check, and these people came some time that day, and he approved the cashing of the check -- both he and Mr. Hoffmann.

He also testified that these were the only checks, the only corporate checks of Paterno & Sons, Inc. that they recalled being cashed in that particular manner -- the only ones.

Why were they the only ones?

Ladies and gentlemen, I leave that to your judgment.

He also testified that these checks were already

endorsed. They were not signed in their presence, and they did not check the identification of the payees. Why? They testified because Mr. Denti had told them the name and the amount of the check that would be coming into the bank,and they relied on it.

Now there has been some argument made that the reasons why these checks were cashed was because these people, these five payees were trying to hide the income.

Well, ladies and gentlemen, if they were trying to hide the income how could they file tax returns?

Now Mr. Andretta and Mr. Hoffmann both testified to conversations they had with the defendants in relation to the existence of these truckers.

Mr. Andretta said he discussed this matter with Mike Paterno and with George Denti; with both of them. Both of them had told him that these truckers existed and had done work for the corporation.

Mr. Hoffmann testified that he alone discussed this matter with Mr. Denti. Mr. Denti had told him that these truckers existed and did work for the corporation, and he also testified that after his grand jury appearance he had gone to Mr. Denti -- I believe they met in the bank -- I am not sure -- and he had told Mr. Denti that he had testified and told the grand jury that Mr. Denti had called

him on each of these occasions when he approved the checks for cash, and I believe he stated that Mr. Denti agreed with him.

Now I would like to turn your attention to the checks themselves. There are six checks that I would like to call to your attention, and I will just say the numbers quickly in case you want to refer to them.

They are 2, 12, 13, 35, 44 and 48.

These six checks were all cashed on the day they were drawn.

There were eight other checks, the numbers of which I won't bore you with, cashed on the following day.

Ladies and gentlemen, you heard some comment yesterday on the speed of our mail. I submit to your judgment as to whether or not these 14 checks could have reached these people by mail or whether or not they had to be picked up from the office.

Now, there have been several occasions, four in number, checks made out to two different payees that were cashed at the bank on the same day:

Government's Exhibits 10 and 21 to Aurrichio and Ferrotta were both cahed on July 11, 1967.

Exhibits 18 and 25, payable to Ferrotta and Lazravitch, both cashed on 12/13/68.

And cashed 8, 17 and 31, payable to Aurrichio, Lazravitch and Tuccella were all cashed on 2/27/67 -- although they were all not made out on the same dates.

Two checks in particular, checks No. 3 and No. 14, those two checks payable to Aurrichio and Lazravitch were both cashed on November 23, 1965.

You will recall the testimony, the handwriting expert's testimony. He testified that the endorsement of Aurrichio and Lazravitch on the back of those two checks were signed by George Denti.

Two checks to two different payees, both signed by Mr. Denti, both being cashed at the same bank, the corporation's bank on the same day.

There are two checks in particular that I think deserve our attention, Exhibit 33 and Exhibit 181.

I believe Mrs. Weisenberg testified as to these two checks.

You will notice, ladies and gentlemen, that the amount of the check on the back -- notice the amount, $242.70 -- that is Mr. O'Reilly's check, both cashed on the same day with the same teller, the same bank.

Who cashed these checks, ladies and gentlemen? Did Mr. Tuccella? Did Mr. O'Reilly?

If you believe that Mr. Tuccella does not exist,

who is left to have cashed this check?

Let me tell you another thing: When you examine the breakdown on the back of the check, notice it comes out to $1695.

I sbmit to you, ladies and gentlemen, for your examination and your mathmatical computations that it is impossible to divide this money, $1695 into two separate checks.

The same person got both checks; the same person cashed both checks. The same person kept the money from these checks.

What that person did with the money, ladies and gentlemen, the government does not know. The government does not intend to prove and never said it was going to prove that. The fact is that it was cashed. That is Exhibit 33.

Now I would like to draw your attention to two other checks, the same situation: Exhibit 35 and Exhibit 180.

You will notice the notation on the back of the check, the amount of the check -- the check for $883.35, a check for $883.35 the same date, the same bank, the same teller, except notice the name on this check, ladies and gentlemen, it says "Joseph Denti."

You have heard testimony during this trial, and it is not a coincidence, that Joseph Denti did work for Paterno & Sons, Inc.

You heard testimony at this trial that Joseph Denti is George Denti's brother, his own brother.

Now, ladies and gentlemen, I submit to you that either one of two people received the proceeds from cashing these two checks, either Thomas Tuccella or Joseph Denti.

Just one thing as far as the last check goes. If you examine the breakdown of that check too you will find that mathematically it is impossible to divvy the money up among two people.

Now, we also called to the stand a witness by the name of Mr. Clausen. Mr. Clausen worked at the Cedarhurst job. There was evidence in the case that these trucks were not loaded by hand. Mr. Rosenthal pointed out that they were not loaded with a hand shovel but by a piece of equipment operated by someone, someone operating a piece of loading equipment. I would like to draw your attention to government exhibit 77, which relates to that Cedarhurst job. There is a gentleman by the name of Louis Smith on the payroll there. Louis Smith, 552 Keller Avenue, Elmont. If you notice, Mr. Smith is listed here. I don't know what he does, but right here on Paterno & Sons certified payroll it says that he is a backhoe operator.

Now, ladies and gentlemen, you know what a backhoe operator is and what he does and what his job is. There

are three days in question. There is December 11, there is December 12 of 1967. If you examine the payrolls of Paterno & Sons, Inc. for those two days, ladies and gentlemen, you will see that there is no one working on those days. If anyone is working it is a carpenter. There is one carpenter working and a super. Carpenters and supers do not operate, I submit to you ladies and gentlemen, backhoes. Backhoe operators operate backhoes and you will see by looking at these, ladies and gentlemen, that there were no backhoe operators working on that day. If there was no backhoe operator working there were no trucks being filled and if there were no trucks being filled there were no trucks there. If there were no trucks there, ladies and gentlemen, these people just don't exist.

When you read Mr. Clausen's pages, that is, pages from Mr. Clausen's book, I believe, ladies and gentlemen, they are quite clear. He didn't write them down yesterday. He wrote them down on the days in question or the day after. This isn't something that he fabricated. This isn't something that he was requested to bring with him to court which he produced. He does not remember specifically what happens on a particular day. These are only the notations that are made on those days and the books says that no one is working

that on one day it says "8:30, Paterno & Sons sent their men home."

If you examine the invoices, ladies and gentlemen, the invoices say that there were no truckers working on those days. Now then, we called in Mr. Nebesny, and I would like to draw your attention to two particular days that Mr. Nebesny had indicated.

I would like these documents, ladies and gentlemen, to speak for themselves. These are not documents that were created in the last couple of weeks, These are documents ladies and gentlemen, that Mr. Nebesny said that he made out on about the days in question. There are two days in question I would like to draw your attention to. One is with reference to that snow storm when there was 20 inches of snow on Johnson Avenue. It says "No work due to heavy snow storm including bulking."

When the report submitted by Mr. O'Reilly, which is the report prepared by Paterno & Sons -- that says "No work due to severe snow storm, Sunday, February 9, 1969, 15 inches" -- it looks like that, but you look at it yourself -- "deep with high drifts. Men unable to get to job site."

Is there any inconsistency between those two men, the employee of Paterno & Sons, and the employee of the

City.

Now the second date I would like to refer you to says "Wednesday, 2/12/69." Now, since that time Congress has seen fit to change Lincoln's birthday. They changed the date. We still celebrate it, but the fact is that it says on that "No work holiday."

Mr. Nebesny's report says "Lincoln's birthday, no work, holiday."

I submit to you, ladies and gentlemen, that by examining these you may determine when you look at those invoices that there was no trucking work done on those particular days.

I would like to also refer, ladies and gentlemen, to those two days in April when they were surveying the job. Mr. Nebesny's report says "Survey work on easement, general layout prior to soldier beam driving."

He lists the number of people working as a super and a party, but no backhoe operator.

Mr. O'Reilly's report indicates for the same day "super, party, chief survey work."

Is there any mention of a backhoe operator?

5-5 12/7, Mr. Nebesny's record says, "One super, two floor layers." Mr. O'Reilly's report, "Two floor layers, one super."

Any contradiction? There is no contradiction, ladies and gentlemen. The employee of Paterno and Sons said the same thing as the city employee. No backhoe operators, no one working on those two particular days, nobody loading trucks, so there couldn't be any trucks there. So, if you examine the company payroll you will see on that particular day there was only one person working, that was Mr. O'Reilly, and we know that because he filled out these reports.

The last thing in relation to Mr. Nebesny, ladies and gentlemen, is the summary that he prepared. The summary he prepared was from two things, the reports filed by Mr. O'Reilly and the reports filed by himself. He added up all the trucks that came to the site in his reports and all the trucks that came to the site as to Mr. O'Reilly's reports. Mr. O'Reilly's reports indicated that for the month of October there were 81 trucks. Mr. Nebesny's reports indicated for the month of October, 81 trucks. Mr. Nebesny's report for the month of November, the following month, 1968, indicated 25 trucks. Mr. O'Reilly, 25 trucks. Any difference? No difference.

But, ladies and gentlemen, if you examine the invoices, if you go through the invoices and count up how many trucks from these five fictitious truckers alone came to the sites you will add up and you will find out in the

month of October alone from them there were 114 trucks, a difference, ladies and gentlemen, of 33. You will find out that for the month of November that there are 52 trucks listed in their reports, only 25 in the other two, a difference of 27, so they have more fictitious trucks coming to the job site than both the reports of Mr. Nebesny and Mr. O'Reilly.

What is the significance of that? Well, the significance of that, ladies and gentlemen, is that that doesn't even include the people who we know did exist, Mr. Minichino and Mr. La Spina.

I would like to turn now, ladies and gentlemen, to the testimony of Mr. Oberg. I believe, ladies and gentlemen, that after you examined Mr. Oberg and his testimony you found him clear, you found him concise, you found him accurate and you found him uncontroverted, ladies and gentlemen. He admitted, ladies and gentlemen, that he wasn't a ballistics expert. He admitted that he was not a fingerprint expert, because he is not. He is a handwriting expert. He is a document analysis expert. He knows nothing about guns and nothing about fingerprints and he didn't profess to know about those things.

Mr. Rosenthal made the remark that Mr. Oberg felt by not putting on this scale, whatever relevance that he believes it has, Mr. Oberg didn't feel that he needed for his

valuation that he was coming to a hick town and that he would be able to fool the old lawyers in New York, in the old hick town. Ladies and gentlemen, I submit to you that this District is one of the most respected and sophisticated judicial districts in the whole country. No one, no one I submit to you, ladies and gentlemen, looks at NewYork as a hick town.

Ladies and gentlemen, Mr. Oberg also identified the typewriter on six of the invoices from two different companies as being prepared on the same typewriter. He did not examine any typewriters at Paterno and Sons Inc. All he examined was the page, the invoice itself. He does not know all of the different makes and models that IBM puts out, but what he does know, he does know that in his laboratory, and he testified to this, they have every single type of type and size that has been manufactured, 1700 different styles and sizes of type, and he testified that he compared the typewriting on this to the type that he has in his laboratory.

Ladies and gentlemen, I would like to refer you to page 808 and ask you if these questions were meant to mislead you or to clarify things. He was asked by Mr. Rosenthal at line 6:

"Q And you have heard of firms that do typing

service?

"A Are you asking me?

"Q Yes. I say, you have heard of firms that do typing services for the general public?

"A I have heard of them, yes.

"Q You have heard of firms that do billing and bookkeeping for the generalpublic?"

Is it the contention of defense that all these invoices were typed at a typing service or at a billing service?

MR. ROSENTHAL: Your Honor, Mr. Silverman has just read to the jury a question which was not answered because Mr. Silverman had objected to the question and your Honor has sustained the objection and I submit, with all due respect to Mr. Silverman, for him to do that in his summation, knowing that it was not and is not a part of the record since the question is not answered and since the objection of Mr. Silverman was sustained, is highly improper.

MR. SILVERMAN: The reason I didn't read the objection and the "sustained" is because I didn't want to create an unfair burden upon Mr. Rosenthal by showing that the court had sustained the objection and considered it irrelevant. That is the reason I didn't read it, your Honor.

MR. ROSENTHAL: You had no right to read the ques-

tion once his Honor sustained the objection.

THE COURT: I am not positive about that, Mr. Rosenthal. His argument was what it was and I will leave it to the jury with all your remarks back and forth standing. I have no other ruling to make on that.

MR. SILVERMAN: One short note as to Mr. Buchbinder, who testified to the mathematical computations of the actual tax owed. He stated that he prepared the figures approximately three weeks ago. Ladies and gentlemen, you will have an opportunity when you go into the jury room to see a copy of the indictment. You have to read it, study it, see whether or not the government has sustained its burden. In that indictment you will find the same figures that Mr. Buchbinder testified to.

I submit to you, ladies and gentlemen, that if there was a discrepancy you would have heard loud and clear from the defense about the discrepancy. I see no reason to question Mr. Buchbinder's judgment and Mr. Buchbinder's testimony when it is in exact agreement with the amount charged and computed at the time the defendants were charged with the crime.

One word, ladies and gentlemen, about the character witnesses. They were all fine, all upstanding people, all people who all of us, myself, speaking for myself, and you I

I hope would like to have character witnesses for us. But there is one thing that these people don't have that you have, the knowledge about this case, the knowledge about the facts of this case. They didn't sit here for two weeks and listen --

MR. ROSENTHAL: That is not correct. There is nothing in this record to indicate what the character witnesses know or do not know concerning the charges made in this indictment and in this case.

THE COURT: Well, I suppose it is fair to say that simply so far as this record is concerned none of these witnesses supplied any knowledge about this case and none of them was asked to report any knowledge about this case, and as I will instruct later on, none of their testimony should be deemed to relate to the factual issues presented by this case except to the extent that the character evidence, reputation evidence, may, as I will instruct, create a reasonable doubt on the ground that people of a certain character may be inferred to behave in a certain way.

Why are you both standing?

MR. BRILL: Because I was one of those concerned, your Honor. And --

THE COURT: You don't have to stand everytime you are concerned. Do you have some objection?

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MR. BRILL: I did have an objection. Mr. Rosenthal spoke before I did and your Honor dealt with it, so I now sit down.

THE COURT: Good.

MR. SILVERMAN: I would like to just make reference, very shortly, to the defense witnesses that were called in this case, excluding the character witnesses. As you remember, I would like to call to your attention that Mr. Rosenthal didn't comment on it at all and Mr. Brill mentioned Mr. O'Connell's name in passing and didn't go into any detail as to Mr. O'Connell's testimony or any of the other people called on behalf of the defense. I submit to you, ladies and gentlemen, that the reason why the three hours or summation, approximately three hours, that the defense spent, approximately one minute was given to the defense witnesses and I believe that signifies the quality and the quantity of the evidence that was adduced from these witnesses.

I would like to refer specifically to that Mr. Siegal, who was able from the dirt in the ground of the pictures that he was first showed, to identify, was able to tell from a man's lumber jacket and from a hole as to that being Watson Avenue. I think that typifies the defense.

Ladies and gentlemen, on the issue of the knowledge of the defendants it is clear that Mr. Denti's testimony that

he says that he did not know any of these people -- in fact, he said that they were hired through Taff and some other people who he named, including La Spina and maybe the foreman, Mr. O'Reilly -- he denied knowing any of the five people.

But, in fact, Mr. Denti and Mr. Paterno told witnesses who testified here at trial that these people existed and that these people worked for the corporation.

How were these people hired, ladies and gentlemen? They were hired through Mr. Denti, Mr. O'Reilly, and Mr. Kanakos and Mr.La Spina. I would like you to look at, ladies and gentlemen, if you have the opportunity, Government exhibit 173. Notice the amounts of money paid to these truckers in comparison to the amounts paid to other truckers. You will notice that, ladies and gentlemen, in each and every year the amounts paid to one or more of the five truckers is greater than any amount paid to any other trucker.

5-4 Specifically I refer you to fiscal years ending 1968 and 1969 when there was almost $60,000 in one year and $40,000 in the following year paid to these people, $100,000 paid to truckers, far in excess of anyone else who received any money for trucking expenses from Paterno & Sons, Inc.

There has been a claim made that Mr. Denti is only a nominal officer of the corporation. You notice that

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Mr. Denti has signed the corporate payrolls, the certified payrolls. Mr. Denti was the signature on the payroll account, and in fact, ladies and gentlemen --

MR. ROSENTHAL: That is another unfair comment. Mr. Denti was the secretary of the corporation and Mr. Silverman as an attorney knows that it is usually --

MR. SILVERMAN: I object to Mr. Rosenthal testifying.

MR. ROSENTHAL: -- the secretary certifies to the records of the corporation.

THE COURT: I don't see anything unfair about what Mr. Silverman said. He is arguing about the status of Mr. Denti in the corporation. The objection is overruled.

MR. ROSENTHAL: I respectfully except.

MR. SILVERMAN: I believe, ladies and gentlemen, when you examine the tax return in question for the last year you will notice also that Mr. Denti's signature appears on that tax return.

Now, there are five checks, ladies and gentlemen, that have been introduced in evidence. Which you really haven't had a chance to look at or which I have not had a chance to really speak about until now. I am referring to government exhibits 205 through 209. You will remember that Agent Rizzo testified that he conducted his audit sometime

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in December of 1970 or January of 1971 till the April 30 date in 1971. There all kinds of questions raised as to motive, the fact that there was an open door policy at their safe. They weren't trying to hide anything. Ladies and gentlemen, the government does not have to establish in this case motive. It is not part of the burden, but I would just like to touch upon one thing to possibly try and help you in looking for a motive, if you are searching for one.

MR. BRILL: I am going to object to this, if your Honor please. Motive is not involved here, only knowledge and intent are involved.

THE COURT: There was an argument unobjected to on motive.

MR. BRILL: I made no argument.

THE COURT: By Mr. Rosenthal. Your objection is overruled.

MR. SILVERMAN: You will notice, ladies and gentlemen, that these checks were all written and all cashed from October 8, 1970, keeping one aside, until December 22, 1970. These four checks may or may not have been issued or cashed at the time Mr. Rizzo was there. It is a fair thing to say he may have come in late December. He might have come in January.

MR. ROSENTHAL: Is he changing Rizzo's testimony

now? Rizzo testified specifically that he came there in early December and denied that he came in January when he was asked at cross-examination and for Mr. Silverman to now change that and say he might have come in December, he might have come in January, I submit is an effort on the part of the prosecutor to change the testimony of his witness because it suits his purpose in this particular argument he is presenting.

5-5 MR. SILVERMAN: I will try to be fair then. I will state it exactly as stated. Excuse me. Assuming Mr. Rizzo did come in December, the last check was cashed and payable to Anthony Ferrotta on December 22, 1970, drawn on that date. That is exhibit 208. The other checks were drawn and cashed in November, except for this one of December 1. Those checks being put aside, I submit to you, ladies and gentlemen, that at the time Agent Rizzo was looking through these books and records the defendants did not know what he was looking for and felt, ladies and gentlemen, I submit to you for your conclusions, they thought that he would not be able to find what was in those books.

Ladies and gentlemen, I submit to you for your examination this check prepared on March 2, 1971 payable to Michael Catenzaro. The check was cashed on April 5, 1971. Ladies and gentlemen, this is the last check, the last

disbursement that was made to any one of these five payees. If at that time, ladies and gentlemen, Mr. Paterno knew, and his signature, I believe, is the signature on the check and you can examine it for yourself -- Mr. Paterno knew that Agent Rizzo was hot on their trail, well, ladies and gentlemen, and if he was innocent and if he did not know that these people did not exist, he would have taken Michael Catenzaro by the collar with this $4,000 check and he would have brought him to Agent Rizzo and he would say, "See, Agent Rizzo, there is a Michael Catenzaro alive and well and living in the Bronx," and would he not have given this check to Mr. Catenzaro, but in fact, ladies and gentlemen, on April 30, when Mr. Rizzo asked Mr. Denti for the current addresses of these people and told them that they were going out to check those addresses --

MR. BRILL: I have an objection to this line and I think that it deals with a question of law which I think your Honor would prefer to hear at the side bar.

THE COURT: Overruled, I will hear it later.

MR. BRILL: All right, sir.

MR. SILVERMAN: On April 30, 1971, ladies and gentlemen, when Agent Rizzo told Mr. Denti that he was going out to check those addresses, they knew from that day and that day on that Agent Rizzo was going to find out, maybe not

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that day, maybe the following week when he went there, that those people did not exist at those addresses and then the focus would turn from those people to Paterno & Sons, Inc. and from that day, ladies and gentlemen, until February of this year, if you examine the books of Paterno & Sons, Inc.-- and these are the ones right up here, the government exhibits right here -- if you go through them and you examine them yourselves you will see that this is the last check that was written to any of these people. There was no check written after April 30, 1971 to any of these people.

Ladies and gentlemen, in conclusion, the government does not know where the money went. One place it knows that it didn't go is that the amount of taxes that is due and owing, that the government claims are due and owing on the amounts charged in this case did not go to the government. The government does not have the ability nor can it prove nor can it do anything in respect to creeping into one person's mind and finding out what is inside that person's head. The government has the responsibility, ladies and gentlemen, of presenting the evidence, the facts that it has and to establish the case beyond a reasonable doubt. Not every possible doubt, not every shadow of a doubt, but a reasonable doubt.

Ladies and gentlemen, if you conclude, if you

decide that these truckers did not exist and if you conclude that Mr. Paterno and Mr. Denti knew that these truckers didn t exist, then, ladies and gentlemen, it is your sworn obligation and it is your sworn responsibility to do your duty as jurors and to convict both defendants and the corporation on each and every count that is charged in the indictment.

Thank you for your attention.

THE COURT: Let me give the jury a ten minute recess, after which I will give you the charge.

(The jury left the courtroom.)

THE COURT: Mr. Brill, you had a question of law you wished to raise?

MR. BRILL: Yes, your Honor. On the basis of the statement made by Mr. Silverman in summation with respect to that large 1971 check and the manner in which it was done, I respectfully move for the withdrawal of a juror and the declaration of a mistrial on the ground that by this indirect method the prosecutor has shifted or attempted to shift the burden of proof to require the defendants to take the stand.

THE COURT: All right, that is overruled.

MR. ROSENTHAL: I have another objection to the summation of Mr. Silverman and it is the very last statement made by Mr. Silverman, and I think I have it practically

verbatim. I refer to when he said to the jury;

"If you find that in fact these truckers did not exist and if you find that the defendants knew that these truckers did not exist, then it is your duty to convict the defendants."

I respectfully submit that he is attempting to usurp the function of the court and that as a matter of law these statements are not correct because the question to be found by the jury is whether or not payments were made by the corporation for services rendered to the corporation. Whether they were made in the names of existing or non-existing people is of no import. The sole question is whether or not there was a proper deduction by the corporation for its business and expenses.

THE COURT: You have said to the jury that that is the sole question. I don't think it is correct. If you had wanted me to elaborate on this while the jury was still here it would have been appropriate for you to get up still another time, and neither of you has hesitated to get up in the jury's presence during Mr. Silverman's summation, but since you raise it after the jury has left for its recess I will take care of the problem simply by telling the jury it must take its instructions on the law from me and I will instruct on the essential elements under

each count which must be found before there may be a conviction on any count.

I think, gentlemen, the jury will be ready for lunch by the time the charge is done and I have asked the marshalls to make reservations. I think the charge will take substantially over an hour, so I think we will let them go directly unless somebody has a different view. We, of course, will be excused while they are out to lunch.

(Recess.)

THE COURT: Now Mr. Soto, ladies and gentlemen: We approach the ultimate in the decisive stage of this proceeding, the time when, on this record of evidence, and on these instructions I am about to give you, the 12 of you will retire to seek a verdict.

It is my responsibility at this time, as you know, to instruct you on the law.

You also know, I am sure, in connection with these rules of law, that in our procedure the judge organizes a charge with the assistance of the lawyers on both sides. They are not rules that I create; they are rules that are embodied in enactments of Congress and in decisions of higher courts. The trial judge putting these things on the record is required to follow these rules faithfully.

Likewise, if the system is to work, it is the jury's responsibility to accept these rules as given and not change them in the jury room, and I am confident that you will follow that course.

You understand that while the main function of the lawyers in summing up is to argue the facts and argue what they think you should find to be the truth, it is not always feasible to argue facts in a vacuum absolutely divorced from notions about the law, so laced through the summations that you have heard are some propo-

sitions that relate to rules of law. Whatever those propositions were on either side, I think it is proper and necessary for me to instruct you that you must take the law as it it given to you in full in these instructions.

In some instances you may find it is too full, but it is requisite that you follow all of these rules, that you apply them all and that you not allow yourselves to be guided by such partial expressions of law as you may have heard during the course of summations. This is not criticism; it is simply a matter of keeping the functions straight and separate as we proceed.

Now your job, as I said, when you first convened just about two weeks ago, is the critical one in any trial. It is to decide the things that are in dispute in any trial, to decide the questions of fact that have been presented to you. Your job is to decide those questions objectively, impartially, coolly without passion, without bias, without prejudice.

It is your sovereign responsibility, and it is the area of your sovereign power, so I repeat, although you have heard it many times, that what the lawyers have said about the facts, and anything that I may have said or seemed to say about the facts, none of those things is of consequence in the end except as they may be persuasive

in your judgment.

It is your sovereign power to decide for yourselves on this record where the truth lies, and to render a verdict based on your judgment of the truth under the rules that I am going to proceed to outline for you. Nothing that has been said in the discussions that lawyers and judges have back and forth should have a bearing on your judgment as to the facts -- that is to say, objections and rulings on objections, while they all have a place in the trial, are methods by which the lawyers and the judge perform their several responsibilities concerning the presentation of their duties. Those rulings, now and in the past, whatever they may have been, are not meant to encroach on your domain, which is to decide the facts, and it would be a waste of your time to try to divine or to guess any views of mine. I have none that could possibly be of consequence to you or that could possibly have weight for you, and so it is my function, and I try to follow it, not to suggest such views to you.

If you have felt that there was such a suggestion it is your proper function to disregard it, because it has no bearing on your exclusive province here.

The basis for your fact finding, as I again think I told you when we first started, is evidence. Evidence is

testimony. It is exhibits. It includes or it is supplemented by things such as have been in this case that are stipulated or agreed upon.

Colloquy and legal arguments are not evidence. Questions are not evidence.

The indictment, copies of which have been given to you now for your convenience, is not evidence, but only a set of accusations that presents the contentions that you must resolve one way or another under the law and on the evidence.

Now in response to that indictment, the three defendants before you: The corporation and the two individuals -- have entered pleas of not guilty. The result of those pleas is to place upon the prosecution the burden of proving guilt beyond a reasonable doubt before any of these defendants could be convicted on any of these counts or accusations. That is a burden that never shifts. It has rested on the government throughout. Whether it has been sustained is not a question that you answer by measuring the evidence physically or counting the number of witnesses, or counting the number of exhibits on one side or the other. It is a question to be answered by taking this whole record together and seeing where it leads you in reconstructing the disputed events and deciding whether

on that totality of evidence the ultimate effect is to persuade you beyond a reasonable doubt of the guilt of any defendant on any count.

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Now, it is a corollary of the government's burden of proof beyond a reasonable doubt that a defendant in our system does not have to prove his innocence. A defendant does not have to prove anything under our system. Every defendant, as you have heard all of us say before, is in our system presumed to be innocent.

Now, that presumption existed from the beginning in favor of these defendants. It will be with them when you go out to the jury room. Under our system the presumption alone is enough to require a jury or other trier of the fact to acquit unless or until the jury or trier of the fact is convinced of guilt beyond a reasonable doubt.

Now, the defendants, not being required to produce any evidence, also have in our system an absolute right guaranteed by the Constitution to decide in their own judgment with counsel whether or not they will take the witness stand. You are aware that the two defendants in this case have chosen not to take the witness stand. To preserve the right that I just referred to, you are instructed that you must draw no inference of any kind from the fact that the defendants did not testify. That fact should play no part whatsoever in your deliberations.

Now, I have talked about, counsel have talked about and you have heard about the familiar principle,

the requirement of proof beyond a reasonable doubt in criminal cases in our courts and all jury instructions obviously need to contain for your guidance some instructions as to the meaning of that basic principle. Now, when we speak in this connection of a reasonable doubt we mean a doubt that is founded in reason, as the words indicate. We mean a doubt that takes its origin in your reason applied to the evidence or lack of evidence in the case before you. We mean a doubt that is substantial and not merely shadowy. We mean a doubt that arises through the exercise of your judgment and the use of your common sense and the use of your wisdom and experience, all directed to the record of evidence and the arguments that have been placed before you.

When we speak of a reasonable doubt we don't mean an excuse to avoid the performance of an unpleasant duty. We don't mean a means or a pretext for extending sympathy to anyone or any defendant. A reasonable doubt in this setting is the kind of doubt that would cause a prudent person to hesitate before taking action in some matter of importance to himself or herself.

Putting that same thought in more words, if you, as all of you have been and as all of us have been, are faced in your own personal affairs with some important

decision and if you proceed to review all the factors that have a bearing rationally on that decision, if you do that objectively and with detachment and if at the end of that kind of consideration you find yourself beset by uncertainty and unsure of your judgment, you would have what we try to identify here when we speak of a reasonable doubt.

The converse of that same explanation is also true. If you had such an important decision to make and if you proceeded through the kind of review of the relevant things that I have just described and if at the end of that you did nto find yourself beset with uncertainty and unsure of your judgment, then you would not have a reasonable doubt.

When we speak of proof beyond a reasonable doubt we don't mean proof to a positive certainty or proof beyond any conceivable doubt whatsoever. If we meant that then nobody in any criminal case could ever be convicted where there were issues of fact.

Without being excessively philosophical, it is in the nature of issues of fact and most clearly of issues of historical fact, things that happened in the past, that they cannot be proved to a positive, absolute certainty, beyond any doubt whatever, so that is not what we mean by proof beyond a reasonable doubt.

In the end, to emphasize again what we do mean, I trust that the words I have given you here on this subject will convey to you the basic thought that in a criminal case in our legal system the prosecution's burden of proof is a very high one and that you may convict only if your minds in the end are free of any such uncertainty or reservation as I have undertaken to describe to you.

Now let me proceed towards the specific accusations and the specific problems presented by them for your consideration. I guess I would ask you not to read the indictment, except as we go along I invite you to read it along with me, as we will do in installments, but until we reach those points, which I hope will be pretty soon, I guess the preferable course to use is to concentrate on the things I am saying. I remind you that the indictment will be with you for your guidance not as evidence but as a statement of the accusations when you go to the jury room.

We have a nine-count indictment in this case against three defendants, not all named in all counts. The first count is a charge of conspiracy in which both the individual defendants and the defendant corporation are alleged to have been members along with others named or unnamed. Now, under our system, just to give you the format and

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outline of this indictment, a charge of conspiracy is a separate and distinct criminal accusation from a charge of the crime or offense which is alleged to have been the object or purpose of the conspiracy.

The gist of the crime of conspiracy, as I will be explaining more fully, is an unlawful combination or agreement or understanding by two or more people to carry out some unlawful or criminal object. Since the heart of the matter is that agreement or understanding, you could and you may in our system have a conspiracy, even though the objective, the so-called substantive crime which is the goal of the conspiracy is never carried out.

Let me illustrate that by a reference to a kind of charge or kinds of charges that have nothing to do with this case and which I use only for illustrative purposes. You could have a conspiracy to commit murder or robbery or arson. That is, you could have an agreement or understanding among two or more people to kill or rob somebody or burn something. The conspiracy in that situation, subject to further things that I am going to tell you about, is the agreement or understanding and you could have a conspiracy proved even though the substantive offense, as I have called it, the murder or the robbery or the arson, was never carried out.

So those goals of a conspiracy, those illegal goals, I may from time to time refer to as substantive offenses to distinguish them from the combination or understanding alleged in this case, which is the crux, as I have said, of the first count, the charge of conspiracy.

Now, since a conspiracy in this case and in most cases as alleged relates to substantive offenses and since the last eight counts of this particular indictment charge such substantive offenses, it is in the end a little clearer, I think, and simpler to begin these instructions with the substantive offenses, the last eight counts, and then come back to Count 1, the conspiracy charge, and I will proceed in that order.

I will soon get to the substantive accusations, but let me say that these charges in this indictment, like all criminal charges in the federal court, are based on statutes, on laws enacted by the Congress. In connection with the Internal Revenue laws of the United States there are a number of criminal provisions designed to enforce the payment and collection of federal taxes. There is a general provision, the number of which none of us needs to remember, but it is Section 7201 of Title 26, which is our Internal Revenue Code, which declares it a crime for any person wilfully to attempt in any manner to evade or defeat

any tax imposed under the Internal Revenue laws or to evade or defeat the payment thereof.

Counts 2 through 5 of this indictment, four substantive counts, charge the three defendants, the two individuals and the corporation with violations of that prohibition for each of the four years ended February 1967 through February 1970.

Now, there is another statute involved in this case, another provision of the Internal Revenue Code, which makes it a federal crime to make and subscribe and sign wilfully any false return under the Internal Revenue laws where a return is verified by a written declaration that it is made under the penalties of perjury and when the person making, subscribing, signing that return does not believe the return to be true and correct as to every material matter stated in it.

Counts 6 through 8 -- three counts of this indictment -- charge the defendant Michael Paterno with having violated that false return statute, if I may call it that for shorthand, for the years ended 1967, 1968 and 1969; that is, he is charged with a wilful filing of a false return for each of those years on behalf of the defendant corporation, Paterno & Sons, Inc.

Count 9, the last count of the indictment, charges the defendant George Denti with a similar offense, a wilfully false return for the year ended February 1970 -- again on behalf of the corporation.

I am going to treat those two groups of charges in sections, dealing first with Counts 2 to 5, the wilful attempts to evade that are alleged here, and then consider Counts 6 through 9, the alleged false returns.

In each of these instances -- and then again when we come back to the charge of conspiracy, just to set the scene and introduce you to this subject, and perhaps help you set the problems more clearly in your mind, I am going to read to you the respective portions of the indictment, and depending on how your memory works and how your thought processes work you are invited to read them along or not, as you see fit.

Let me start, then, with Counts 2 through 5, the

alleged wilful attempts to evade that begin at the bottom of page 3 of the indictment. Those say:

"The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York, Paterno & Sons, Inc., a corporation, Michael Paterno, who was then the President of Paterno & Sons, Inc., and George Denti, who was then the Secretary-Treasurer of the said corporation, the defendants, unlawfully, wilfully and knowingly did attempt to evade and defeat and cause to be evaded and defeated a large portion of the corporate income tax due and owing by Paterno & Sons, Inc. to the United States of America for the said corporation's fiscal year ending on the 28th day of February, 1967, 29th day of February, 1968, 28th day of February, 1969, 28th day of February, 1970, respectively, by preparing and causing to be prepared, and filing and causing to be filed with the Internal Revenue Service, a false and fraudulent corporate income tax return for and on behalf of the said corporation, wherein it was stated that the said corporation's taxable income for each respective fiscal year was the amount hereinafter set forth, and that the amount of income tax due and owing thereon was the amount hereinafter set forth, whereas, as said defendants then and there well knew, the said corporation's taxable income for the

respective fiscal year was approximately the amount hereinafter set forth, upon which said taxable corporate income there was due and owing to the United States of America an income tax of the approximate amount hereinafter set forth:" -- and I won't read the numbers, but the years I have already described them -- they show what the government alleges was the actual income reported and the actual tax paid for each of the years as against what the government alleges was the higher amount of income properly to be reported, and the higher amount of tax allegedly due on those larger amounts of income.

Now in order to convict any defendant of the charges on any of these counts 2 through 5, the charges of wilful attempts to evade, the government is required to establish beyond a reasonable doubt each and every one of three essential elements -- and when I say "each and every one" I mean what that means in English; that is to say, if any one of these elements is not established beyond a reasonable doubt then the jury is required to acquit.

The three essential elements are these.

First, that for the particular year you are considering a substantial amount of federal income tax was due and owing from the defendant corporation, Paterno & Sons, Inc.

Second, that the particular defendant you are

considering at any given time made an attempt to evade or defeat that tax.

Third, that the defendant made that attempt knowingly and wilfully.

Now I am going to elaborate on this point and follow the same patent later on on each of those three essential elements.

Going back to the first, I said that the government must prove that there was a tax due and owing; that the defendant Paterno & Sons, Inc. had taxable income which that defendant, the defendants Michael Paterno and George Denti, failed to report on the corporate income tax return; and that had they reported such income there would have been a substantial additional tax due and owing to the United States.

Now the government's contention as to the amount of income reported and as to the actual income which the government claims was due, as to the amount of taxes reported, and as to the higher amounts of taxes allegedly due -- those contentions are summarized in the schedules that were received in evidence as Exhibit 165 -- the exhibit that I think Mr. Buchbinder placed before you.

The core of the problem underlying the contentions in those schedules, and perhaps the core of the problem

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underlying this indictment as a whole, is the allegedly overstated truck rental expenses for the corporation in the years in question.

Now in this case, which is a criminal case and not a tax collection case, the government is not required to prove the actual amount of the overstated expenses to an exact mathematical certainty. It is sufficient in this regard but also necessary that the proof establish that a substantial portion of the corporate tax liability was evaded.

Now what is "substantial" is a word that is also not of imprecise meaning to some degree; it is not measurable in exact numbers, and it varies from case to case.

In a case like this, it is in part a function of comparing the amount of income reported with the amount allegedly unreported; the amount of tax paid with the amount allegedly not paid.

Leaving you with this thought that it is not a concept measurable to the last dollars and cents, I will simply instruct you that if the government has proven beyond a reasonable doubt a deficiency for any particular year, either in the amount alleged or approximately the amount alleged, those amounts would, in the circumstances of this case, be such as to permit you to make a finding

that they were substantial.

I move on to elaborate briefly on the second essential element of this charge of wilful attempts to evade. That is a requirement of proof that there was an attempt to evade or defeat the tax for any or all of the particular years in question.

You know by now that the allegation in the indictment on each of Counts 2, 3, 4 and 5 is that full corporate income tax returns were prepared and filed, and that they were false specifically in that they overstated the amount of deductible expenses incurred by the corporation, and that as a result of that overstatement, by subtracting those allegedly inflated expenses the corporation's return understated the net or taxable income.

Now, an attempt to evade within the meaning of these counts, 2 through 5, and the statute underlying them, may be established if it is shown that the defendant prepared or caused to be prepared a false return that was knowingly submitted to Internal Revenue Service. In order to file knowingly a false and fraudulent return in this sense, a defendant must know that he or the entity on behalf of which the return is being filed had income in the year or years in question, that the income was taxable, that the income was required to be reported under the law, and that he was attempting to evade or defeat the tax on that amount of income or a substantial part of it by knowingly and purposely failing to state the amount of net taxable income knowing it was his duty to report that full net amount.

I might say that in speaking here on these four counts and likewise later on the first count of things that must be shown to have been done knowingly and purposely before there may be a conviction, I am thinking obviously and speaking obviously of qualities of human behavior or a human status or condition, status of knowledge or cognition, and you will be aware that one of the three defendants in this case is not a human but a corporation. I instruct you very simply on this, and you probably would infer in any event, that under the law for this kind

of purpose the knowledge of a corporation is the knowledge of its responsible officials or agents and you will consider whether the guilt of the corporation has been shown in light of that fairly familiar principle.

Having that in mind and having in mind this central problem of knowledge throughout, I instruct you that the knowing and understanding preparation and submission to the Internal Revenue Service of a false tax return is the kind of act that may be found by a jury to constitute an attempt under the statute to evade or defeat the tax.

Further, I instruct you that where such facts are established they may permit in light of all the evidence the finding of a wilful attempt to evade or defeat the tax. If the tax evasion motive plays any part in the knowing preparation of a false tax return, the offense may be made out even if the conduct may or might have served other purposes than those related to tax.

Now, I stated to you, and I stress to you again, a third essential element which in some measure may overlap the one I have just been talking about but needs separate emphasis and additional elaboration because it is critical to the kind of accusation in the case and critical to any possible finding of guilt on such an accusation.

I speak of the element of knowledge and wilfulness.

No defendant could be convicted of a charge of this kind, the kind in Counts 2 through 5, unless he is shown to have acted within the meaning of the law, knowingly and wilfully.

Here we refer to the critical matter of criminal intent and in this and in most cases there can't be a conviction of crime without a demonstration of that kind of intent.

So, if you find that the defendants prepared or caused to be prepared or filed or caused to be filed false and fraudulent corporate income tax returns, but if you are not satisfied beyond a reasonable doubt that this was done knowingly and wilfully with an intent to evade tax, you would be required to return a verdict of not guilty on Counts 2 through 5. It becomes significant, therefore, for you to have in mind the meaning of those words, knowingly and wilfully.

Though the meaning is central, it is not especially complicated. It is not especially technical. In general, we say that a person for this kind of criminal law purpose acted knowingly and wilfully if he acted voluntarily and purposely, deliberately and intentionally with an understanding of what he was doing and not as a result of mistake or accident or negligence or ignorance.

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To establish this element, then, of knowledge and wilfulness the government must have satisfied you beyond a reasonable doubt that the defendant acted in the fashion I have described with a specific intent of concealing the true taxes known by him to be due and owing to the United States.

Perhaps somewhat repetitiously, let me say, that a good faith misunderstanding of the liability for taxes is not a knowing and wilful attempt to evade or defeat taxes. There is no wilfulness of the requisite kind if all that happened is mistakes of law or mistakes of fact or mere miscalculation or bad judgment. A taxpayer, a defendant, acts in good faith if he believes that the returns filed truly reflect the income in the respective years that may be in question.

The government, as I said, must prove more than mere negligence or carelessness or stupidty. It must prove with respect to any particular defendant that he knew what he was doing and wilfully did it intending to attempt to evade taxes. It must have been part at least of his conscious and deliberate purpose to engage in conduct designed to defraud the government of the true tax due and owing.

A consistent pattern of understatement of sub-

stantial amounts of income by a taxpayer or defendant is conduct of a kind that may allow an inference of wilfulness and a wilful attempt to evade taxes. Since, as I shall be further expanding on this in a little while, this problem of state of mind, knowledge, wilfulness is one that must be solved in terms of circumstantial evidence. You will be looking at circumstances which is what circumstantial evidence refers to, in order to determine whether the requisite state of mind has been shown to have existed. A jury, a trier of fact, may infer wilfulness from varieties of kinds of behavior. In this setting the handling of normal transactions in an unusual or circuitous fashion, the use of large sums of currency when checks or the depositing of checks would be the normal and expected course of procedure, the keeping of false or fictitious records, such things, and any other kind of conduct, the likely or probable effect of which would be to mislead or conceal, may show the kind of wilfulness I have been discussing provided it is found that the conduct was designed to cheat and defraud the federal government of its revenue.

I will have some general things later to say about the entire indictment, but let's move on to Counts 6 through 9, and although these are in two sections in the

indictment, I think we can treat them together for purposes of these instructions.

These are, again speaking in shorthand for a second, the false return accusations -- Counts 6 through 8, naming defendnat Michael Paterno; Count 9 naming defendant George Denti.

6 through 8 read as follows -- and you see they start at the bottom of page 4:

"The Grand Jury further charges:

"On or about the dates hereinafter set forth, in the Southern District of New York, Michael Paterno, the defendant, who was then the President of Paterno & Sons, Inc., unlawfully, wilfully and knowingly did make and cause to be made and subscribe the income tax return of the said corporation for the said corporation's fiscal year ending on the 28th day of February, 1967, 29th day of February, 1968, and 28th day of February, 1969, respectively, which return contained and was verified by a written declaration that it was made under the penalties of perjury, and which he did not believe to be true and correct as to certain material matters, namely, the amount of the said corporation's equipment rentals deductions and equipment repair deductions entered therein, in that, as he then and there well knew, the said corporation's equipment rentals deductions and equipment repair deductions were less than the respective entered amounts:" --

And then it goes on to enumerate the years, the amounts reported, the amounts of the alleged overstatements, and the type of expense in each instance.

Now Count 9 is against George Denti. It is, with respective changes in facts and circumstances, identical in its essential elements with Counts 6 through 8, and it relates to the fiscal year ended February 1970 for which, as appears to be undisputed, Mr. Denti signed the corporate tax return.

So without reading that, I say we can treat all four of these together for purposes of conveying to you the legal rules that govern.

Again, the requirements of proof placed upon the government may be analyzed in terms of so-called essential elements, and here I instruct you that with respect to Counts 6 through 9, before there could be a conviction on any of them, the government must have satisfied you beyond a reasonable doubt on each of every one of the essential elements. They are as follows:

First, that the return in question was signed by the defendant in question.

Second, that the return contained or was verified by written declaration that it was made under penalty of perjury.

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Third, that the maker, the defendant, did not believe the return to be true and correct as to every material matter.

Four, that the maker acted knowingly and wilfully at the time he made and signed the return.

Now you will note that in the listing of the four essential elements here under Counts 6 through 9 there is not any reference to income tax evasion as such. We are dealing here with a different statute. This statute is designed to insure that the government is provided with accurate and complete information on returns and statements in connection with the revenue laws.

For that reason I instruct you that here you do not specifically concern yourself, as you would and must under Counts 2 through 5, with tax evasion as such; I also instruct you that in the four elements I have listed it is not an essential element of this offense that the government be shown to have relied on the particular false statements in question.

Now with that, let me proceed in the standard way and go back again to elaborate more or less briefly on each of the four essential elements involved in Counts 6 through 9.

First, as I said, is the requirement of proof

that the particular defendant in question signed the particular return in question -- that is, Michael Paterno for the years 1966 through 1968; George Denti for the year 1969 -- all of those years ending, as I recall, in February of the following year.

Now as to that, the returns are in evidence, and I believe, subject to your controlling recollection, there is no serious question in the case on this subject. It seems, I think, to be undisputed that Michael Paterno signed the first three returns and George Denti the last.

Nevertheless, I tell you that that fact of signing is an essential element. You must be satisfied on it beyond a reasonable doubt before you could convict on any of these four counts, 6 through 9.

The second essential element, as I said, is the requirement of proof that the return contained or was verified by a written declaration that it was made under penalty of perjury. Here again I think we are not in the area of any crucial dispute.

The returns, I believe, contain such a legend that they are made under penalties of perjury; but again I instruct you that you must be satisfied of this and may not convict unless you are, because it is an essential element of the offense with which we are dealing.

We move to more sharply disputed things when we get to the third and fourth elements.

The third element, as I said, is the requirement of proof that the maker, the person who signed the return, believed or knew that the return was not true and correct to every material matter.

By "true and correct" we mean accurate and complete.

By a "material matter" in this setting in this case, we mean the correct statement of the kinds of expenses with which the case and the indictment are concerned; and we mean, of course, an amount in each instance that can fairly be deemed to have been substantial and not trivial or insignificant in the circumstances of the case.

An important issue here, as elsewhere, is whether the defendants overstated the actual expenses incurred by the corporation, by causing checks to be made and cashed and shown as deductions for trucking services when those trucking services were not performed for or on behalf of the corporate defendant.

Again I spoke of the necessity, in order to show that these things are material, that the amounts involved be substantial. Again I say that we are not concerned with whether the amounts have been proved to dollars and cents.

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We are concerned with whether the amounts proved by the evidence have been shown to have been large enough in terms that I have already touched on in talking of Counts 2 through 5, so that they may be deemed to have been substantial in the circumstances of this case.

I remind you of what I said earlier and again I instruct you that the amounts alleged in the indictment under these counts, if they areproved or if they are approximately proved, are sufficient to qualify as substantial and to permit you to find substantiality in the circumstances of this case and would permit you, in your judgment, to determine that these matters were material.

Of course, as I have defined this third essential element, a finding that these numbers involve material misstatement of fact would not be sufficient by any means to make out the offense in Counts 6 through 9. As I have said, and as I repeat, the heart of the offense is that the particular defendant must have known that the statements were false and must have wilfully made them anyhow.

Again,more or less tracking things that are involved in the earlier counts, 2 through 5, let me instruct you, and this is important, that if a defendant signs a return in good faith and believes it to be true, he has not committed any crime under the federal income tax

laws.

In such a case, even if the return is in fact incorrect or inaccurate, the defendant may be laboring under a mistake or may have accidentally or carelessly caused an error to be made, but would not be guilty of the kind of criminal misconduct with the kind of criminal knowledge that concerns us throughout this case.

So, a key question in Counts 6 through 9 is what the particular defendant himself knew or believed with respect to whether the return being filed for the corporation was true or false, and this occurring once again, but requiring emphasis and understanding once again, directs you to look once more at a question concerning the state of a defendant's mind.

I have touched on this, but let me expand on it: You will note that in considering the state of someone's mind you are called upon to decide a fact, because it is a fact. While it is a fact it is, as you also know, not the kind of fact on which we normally have so-called direct evidence. We can't look at a person's mind and by our senses perceive what he does or doesn't know, what he intends or doesn't intend.

In that sense we don't have direct perceptual evidence, so outside the courthouse as well as inside the

courthouse, when we are concerned to know or make a judgment about the state of someone's mind we are in the habit of relying on so-called circumstantial evidence. We look at a person's situation. We consider his status. We consider his character. We consider whatever we can know about the opportunities he has had to learn about the things that may be in question. We consider what ability he had to observe and understand the events with which we are concerned. We consider what he may have said or done at the times in which we are interested. We consider all the facts surrounding his behavior and from that we make a judgment about what he knows or knew or what he intends or intended at the particular time in question, and that will be the nature of your inquiry here.

You will consider these defendants in the setting in which the evidence presents them to you. You will consider specifically what they knew or may have known or have been proved by the evidence to have known about the situation respecting truckers and trucking services.

Considering all the circumstances, you will be determining together whether from the evidence you have heard it had been proved beyond a reasonable doubt that the five truckers about whom you have heard so much were non-existent; whether the expenses attributed to

those five truckers were never in fact paid; whether, as the government contends, it has shown beyond a reasonable doubt that such trucking expenses indicated in connection with those five names were never in fact incurred by the corporation or paid for such trucking services to anyone.

Now, in stating to you the fourth essential element under Counts 6 through 9, I again overlapped things that I have just been talking about, but we set it out separately to make sure that it's given its full weight and significance in the jury's deliberations. I stated that a defendant under this kind of false return accusation may not be convicted unless he is shown to have acted knowingly and wilfully.

Now, I instructed you on those key words earlier and what I said in talking of Counts 2 through 5 is applicable again here. In the specific context of these four counts, the false return counts, I instruct you that the subscribing of a false return prohibited by the statute may be found to be knowing and wilful if it is found to have been done voluntarily, deliberately, purposely with a specific intent to sign a return that was not true and correct when the signer knew and believed that it was not true and correct, and if this was done for the purpose of concealing from the government true facts, material

facts relating to tax liability, this element of knowledge and wilfulness, as I say, could be found by you to have been established.

I remind you again that here, as throughout this case, under the criminal tax laws a person must be shown to have acted wilfully before he may be found to have committed this kind of crime. Nobody may be convicted for innocent mistakes, stupidity, carelessness, negligence. It is not sufficient for the government to show the return was prepared hastily or recklessly, whether or not that is conduct of which we would generally approve.

In deciding whether there has been a criminal violation there must be proof beyond a reasonable doubt of knowledge and wilfulness.

So, as I have instructed you earlier, you will consider all the evidence you have heard of the activities that have been described here and decide whether the government indeed through all of Counts 6 through 9 has shown that the defendant acted knowingly and wilfully in the sense that he acted deliberately, purposely, understandingly with the kind of specific intent to mislead that I have been talking about.

If you find such proof and if you find the other three elements you may convict under Counts 6

through 9.

If you do not, you must acquit.

Does anybody besides me need a break? I can do without it.

I think we are somewhat more than halfway through, and since we are going to go into your normal lunch hour I would just as soon proceed, if you are in shape to have me do that.

Does anybody wenat a recess?

JUROR NO. 3: Yes, I would like a recess.

THE COURT: All right, take five minutes and then we will resume. I am about to go back and charge you on the conspiracy count.

(Whereupon, the jury left the courtroom.)

THE COURT: When we finish the charge, what is your preference? Do you want to give the jury another recess or would it be convenient to come to the side bar to take any exceptions?

MR. BRILL: I think it would be an imposition -- we can do that later, Judge.

THE COURT: All right. Let me simply arrange it so that none of you will be under fire to ask whether anybody wants another recess, and if so, raise your hand or indicate it; if not, we will do it at the side bar.

Okay?

MR. BRILL: Yes, thank you.

(Short recess.)

(Jury present.)

THE COURT: All right.

We go back now to the conspiracy charge which is Count 1 of the indictment. I am going to read this to you, too. I will read it in two installments. I am going to read first up to a point on the second page where there is a heading "Overt Acts," and I will stop there and read some or all of the rest later on, for reasons that I hope will be clear in a couple of minutes.

Count 1 says: "The grand jury charges:

"1. From on or about March 30, 1965 and continuing thereafter up to the date of the filing of this indictment, in the Southern District of New York and elsewhere, Michael Paterno, George Deni, and Paterno & Sons, Inc., the defendants herein, unlawfully, wilfully and knowingly did combine, conferate and agree together and with each other, and with other persons to the Grand Jury unknown, to commit offenses against the United States, to wit, to violate Title 26, United States Code, Section 7201.

"2. It was part of said conspiracy that said defendants and co-conspirators would wilfully attempt to

evade and defeat a large part of the income taxes to be due and owing to the United States of America by the defendant Paterno & Sons, Inc. for the fiscal years ending February 28, 1966, February 28, 1967, February 29, 1968, February 28, 1969, and February 28, 1970.

"3. At all times mentioned in this indictment Michael Paterno was the President of Paterno & Sons, Inc., and at all times mentioned in this indictment George Denti was an officer and employee of Paterno & Sons, Inc.

"4. Among the means whereby said defendants would carry out the said conspiracy were the following:

"(a) The defendant Michael Paterno would sign corporate checks of Paterno & Sons, Inc. as maker payable to fictitious payees.

"(b) From time to time the defendant George Denti would endorse corporate checks in the names of fictitious payees and would also authorize bank offcials to approve the cashing of corporate checks which were made payable to fictitious payees.

"(c) The defendants Michael Paterno, George Denti, and Paterno & Son, Inc. would unlawfully, wilfully, and knowingly attempt to evade and defeat and cause to be evaded and defeated a large portion of the corporate income tax due and owing by said corporation by preparing and causing

to be prepared false and fraudulent income tax returns for and on behalf of said corporation, wherein checks made payable to fictitious payees were deducted as business expenses, whereas the defendants then and there well knew no such expenses had been incurred."

Once again the burden of the government, before there could be a conviction, is to prove each and every one of the essential elements -- and again there are three such elements with respect to this conspiracy charge.

First, that the conspiracy, the kind of conspiracy charged in this count actually existed.

Second, that the particular defendant you are considering -- and you must consider each defendant separately for this and other purposes -- became a participant in or a member of that conspiracy.

Third, that one of the conspirators, knowingly committed at least one of the overt acts sets forth in the indictment at or about the time alleged.

And, by the way, when I stated that second essential element, it cannot hurt to go back and say that membership in a conspiracy must happen knowingly and wilfully, to use those familiar words, before it may be found to have existed.

Again I am going to elaborate on those essential

elements.

As to the first, it requires proof that the conspiracy described in the indictment existed.

I have to expand a little on the meaning of the word "conspiracy" for this purpose -- repeating some things I said earlier, perhaps.

A conspiracy is defined in this and most settings as a combination or agreement of two or more persons by concerted action, by acting together, to accomplish some criminal or unlawful purpose.

As I told you before, it is the unlawful combination or agreement to violate the law that is the gist of this crime of conspiracy.

It is often said that a conspiracy is a kind of partnership in crime, in which each conspirator member becomes the agent of each other member, but it is not necessary, although we use words like "agreement" and "partnership" that the government, the prosecution, prove a formal contract or agreement, or a formal partnership in the usual, normal, lawful senses of those words. Your common sense will tell you that if people entered into a criminal agreement or understanding it is likely to be informal. Much is left to tacit or casually or informally expressed understandings rather than formal and legal

sounding kinds of engagements.

I told you earlier that the essence of the crime here is the unlawful agreement, and that a conspiracy may be found to have existed even if its goal or object, the unlawful substantive goal, was never carried out.

At the same time, evidence in any particular case that the purpose was carried out, that the substantive offense was committed, may be considered by the jury as some evidence that the alleged conspiracy actually existed.

3/1 Now, the task of a jury in a conspiracy case, your task in this case, is to take all the evidence as a whole and dealing it as a whole reach a judgment whether the proof establishes beyond a reasonable doubt that the alleged conspirators agreed, expressly or tacitly, to pursue the unlawful objects alleged in the indictment.

Specifically, you are to decide whether the evidence establishes an understanding or agreement, express or tacit, having the specific purpose and intent to evade or defeat income taxes due or owing from the defendant organization and employing as a central means toward that goal the reporting of substantial amounts of trucking expenses not actually paid but recorded in books and records and checks as having been paid to truckers that did not in fact actually exist.

If you are convinced that there was a conspiracy of this kind in existence, the precise period of its existence is not a critical factor for you to worry about. To amplify that, you will note again if you reread it, and you may have noted it when I read it, that the period charged in the indictment following a form of the drafting of indictments alleges a conspiracy that ran from March 30, 1965 up to the date of the filing of the indictment in this court, which was May 3, 1973, and all I have said about

duration at this point, all you need to know, is that the government is not required to prove that the conspiracy lasted or existed throughout that period of years. It is sufficient on this question of duration if the government has proved such a conspiracy existed for at least some time within that period of years.

Now, if you don't find beyond a reasonable doubt that there was the kind of conspiracy charged, your task is ended on Count 1 and you must acquit.

If, on the other hand, you find there was a conspiracy you move on to what I described as the second essential element. You reach the question of whether the defendants on trial knowingly and wilfully became participants in that conspiracy.

As I said before, this element of membership or participation must be considered with specific and individual and separate reference to each of these specific and separate defendants on trial before you. In this respect, as in substantially all others in our system, guilt is a personal and individual matter. We don't follow doctrines of guilt by association.

So, the participation of anybody in a conspiracy, if it is to be found, must be found by evidence as to that person's own words and actions and conduct considered in

the light or in connection with pertinent words and actions and conduct of other people.

You will understand, of course, that in most settings the statements or conduct of any individual are liable to take on meaning and significance from the related statements or conduct of other people, and so you will follow that common sense understanding in this case; that is, while it is your task to determine guilt or innocence individually, you may and you undoubtedly will want to consider the behavior of the defendants before you in connection with the behavior of other people to the extent that any such connections are established by the evidence to your satisfaction.

Then approaching the ultimate question of membership or non-membership, you may decide whether the government has proved this second essential element on the basis of all the evidence that has been placed before you.

I told you that in order to be held to have become a member of a conspiracy a defendant must be shown to have acted knowingly and wilfully and I have talked a lot about the meaning of those words. Knowing and wilful behavior must be voluntary, intentional, purposeful, deliberate, not accidental or careless or mistaken. You will recall the things that I have said on this subject.

You will apply them here in connection with the conspiracy charge.

More specifically, to find that a defendant became a member of this conspiracy you find that he knew its unlawful purpose or purposes and knowingly associated himself with them. The government must establish in this respect that a defendant entered into this conspiracy aware of its basic nature and with a specific criminal intent, namely, the intent to attempt to evade or defeat taxes owed by the defendant corporation.

Mere association in business or other things with one or more conspirators or presence with one or more people engaged in a conspiratorial activity does not make a person a member of that conspiracy.

Knowledge that other people are conspiring does not make a member. What is necessary is both knowledge and criminal association. The defendant, to be found to have been a member, must have associated himself, however informally, with the scheme or plan knowing its purposes and intending himself to act in some way to accomplish those criminal purposes.

If you are persuaded of this beyond a reasonable doubt with respect to either defendant, you may find that he was a member of the conspiracy. If you are not, you

may not so find and you must acquit.

Now, the third and last essential element under the conspiracy charge is the requirement or proof that some member of the conspiracy, not necessarily the particular defendant you are considering, committed during the conspiracy and for its furtherance at least one of the overt acts alleged in the indictment, and that brings us to the part I didn't read and I will spare you a complete reading of it, but you will see that starting on page 2 and running over to page 3 there are alleged 10 so-called overt acts numbered here:

"1. On or about February 20, 1967 George Denti, endorsed in the name of Thomas Tuccella, Paterno & Sons, Inc. check #9849, in the amount of $3,468.60, payable to Thomas Tuccella.

"2. On or about February 20, 1967 Michael Paterno, signed as maker, Paterno & Sons, Inc. check #9849, in the amount of $3,468.60, payable to Thomas Tuccella."

And so on, acts numbered 3 through 10.

Let me just say about these that under our law the proof of at least one overt act is made almost always and in this case an essential element of a conspiracy charge on the premise that mere talk should not in itself

be made criminal. The assumption here is that people might talk together about committing some kind of illegal behavior. The principle is that unless they then take at least some step to carry out the crime, they should not be held to have committed the crime of conspiracy, and so the law requires, in addition to the first two elements, the conspiracy and membership, proof of at least one overt act. The overt act does not have to be something in itself illegal -- signing a check, endorsing a check and all or most of the other things in these 10 -- perhaps all of them, I have not rechecked -- are in isolation, by themselves, non-criminal kinds of conduct. The requirement of proof here is that one of these things be found to have been an act done in the course of and in furtherance of the alleged conspiracy. If that is established and the other two elements are established, you may find that the government has proved the conspiracy charged in Count 1.

Now, I have a fair amount of additional things to say to you, but I have concluded at this point the outlining of the offenses and the specific essential elements under each of the groups of charges in this case. I want to make some further remarks now, some relatively brief ones, about one or two aspects of the evidence and then some things about the nature and quality of your duties

in your deliberations.

You heard summations yesterday and today. You heard arguments about what you should or should not find. Obviously you considered those arguments. Arguments are not evidence, they are efforts to persuade you and to focus you on the evidence and to cause you by rational argumentation to be led to one or another judgment about the facts.

In any event, I am not going to add another summation or anything like another summation, and I am sure you will be glad to hear that. I do want to touch briefly, because it seems to me appropriate and necessary, on one or two aspects of the evidence and tell you some things in connection with that. I want to say a very few words -- I have already said some during the course of the summations -- about the subject of character evidence. In a criminal case in our system a defendant is permitted and entitled to call in his defense so-called character witnesses. These are witnesses who may testify as witnesses testified here for both of the individual defendants as to the reputation of the defendant for honesty, integrity, veracity. Such evidence of reputation which is, strictly speaking, all that the witness is allowed to give and not his own opinion even on that, such evidence of reputation is evidence from which a jury may infer things about the character of the defendant.

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You may consider and you should consider such evidence, together with all the other evidence in the case, in determining whether the charges or any of them have been established beyond a reasonable doubt.

Under our law, evidence of good character may, in itself, create a reasonable doubt where no reasonable doubt would have existed in the absence of such evidence; but if on all the evidence in the case, taken together, including the evidence of character, the jury is satisfied beyond a reasonable doubt that a defendant is guilty, a showing that he had previously enjoyed a reputation for good character does not justify or excuse the offense. In other words, you are not entitled or permitted to acquit a defendant if you are convinced beyond a reasonable doubt of guilt merely because you believe he is or was a person of good repute.

You should also understand that, as it has been placed before you, none of this character evidence is to be deemed as an opinion as to the guilt or innocence of any defendant here on trial. That, of course, is for you to determine and all the evidence from the instructions I am in the process of giving you.

Now I spent a good bit of time until a minute or two ago outlining the charges in the indictment and the

essential elements, and I placed before you the several essential elements which must all be established with respect to any given count before there can be a conviction. I stress to you that you must together keep all of those instructions and requirements in mind, and that you may not convict unless all essential elements are proved with respect to any given charge.

I add, nevertheless, subject to your sovereign judgment, which I stress once again, it may be that you will be led to conclude from the evidence and the argument that a critical question in this case is whether the five truckers, about whom you have heard, were real or fictitious. I emphasize that this is not the whole of the case. At the same time I suggest that it may result in your judgment that this is close to the crux of the case.

To summarize, then, in a very few words -- and I do not mean to give you a complete account on either side -- the government's contentions, as I am sure you know by now, are that the five truckers -- Aurrichio, Catenzaro, and so on -- did not in fact exist; that the defendants in this case knew there were no such truckers; that the defendants arranged to have invoices created and checks paid to those five fictitious truckers as purported expenses

deductible by the corporation, and that these alleged expenses were then deducted from the corporation's income on the tax returns, notwithstanding that the defendants knew that the expenses had not been incurred and were fictitious.

I have emphasized earlier, and I emphasize again, that the question of defendants' knowledge with respect to this central problem is, of course, crucial throughout the case.

Let me stress that once again. Let me remind you that the non-existence of any or all of those five truckers would not, in itself, justify convictions in this case.

So, for example, if you find that those five did not exist, but if you also find that the defendants, or either of them, did not know of this non-existence, or to put it just for a moment positively, if you find that the defendants believed these truckers existed and that the checks were issued to them for services actually rendered to Paterno & Sons, Inc., then you must acquit the defendants inasmuch as they would not in such circumstances have the knowledge or the specific intent required under the law to commit the crimes charged in this case.

And remember that here, as throughout, the burden of proof is on the government. The government must prove beyond a reasonable doubt that the defendants had

the kind of guilty knowledge they are alleged to have had on the subjects in question, and specifically on the non-existence of these truckers, and the illegality of the deductions taken and attributable to them. But since the essence of the charge is related ultimately to defeating the tax laws, to tax evasion or attempted tax evasion in one way or another, the defendants could not be convicted here unless the truck rental deductions they took were in fact false and intended to be false.

Thus, if you find that the payments which the government claims are fictitious, were actually made, and were actually made for truck rental services, and were actually made in the good faith belief that these were proper deductions, you could not convict any of the defendants.

To repeat, if the government has not proved beyond a reasonable doubt that the defendants were not acting on such good faith belief in the validty of these truckers, you would be required to return a verdict of not guilty.

Now, in focusing on what I have suggested, may, in your judgment, be that central area of the case, you are obliged to review, and you will review, all of the evidence and all of the arguments you have heard on both sides.

I told you that I do not mean to make an additional

review or anything approaching a full review beyond what you have heard in the summations and what you will collectively be deliberating on together, but merely to start your thinking, which will be commencing before too long, I remind you at least of some of the contentions and some of the factual claims on both sides of that central issue of dispute.

The government relies on its evidence that the five truckers were searched for and found to be non-existent; that there were no such people at the addresses shown in the defendant corporation's records; and that at least in several instances there were no such addresses at all.

The government invokes similar evidence as to phone numbers. It points out that there were no records of any such people in the places where records might be expected to exist, although conceitedly they would not necessarily exist in the case of every real person -- records in places that are public agencies of one kind or another, about which you have heard.

The government relies on its contention that the defendant corporation's business records, despite the apparent non-existence of these five truckers, contained invoices that purported to come from them, and checks that purported to have been paid to them.

It has been argued that when the government came to audit the corporation's returns, the substantial portion of trucking expenses here in question was explained on behalf of the company in terms of these five alleged truckers, and in terms of records asserted to relate to them.

The government relies on evidence alleged to show that Mr. Denti signed as endorser some of the checks in question, and evidence that Mr. Paterno would never sign corporate checks without support data, and that the checks for these five allegedly non-existent truckers were signed by Mr. Paterno in the absence of such data or materials.

/1 In response to these contentions by the government, the defendants argue that the non-existence of all or any of these truckers has not been proved beyond a reasonable doubt. They urge that the government, which has the burden of proof, has not demonstrated that all or some of the truckers did not actually exist. They argue that the evidence placed before you, including the absence of records or addresses or other indications is not sufficient to negate the existence of one or more of those truckers.

Secondly, the defendants argue, even if those five truckers are found by you to have been non-existent, the defendants cannot be convicted because they have not been shown to have known or believed that those people were fictitious or imaginary. They say that the government has not established that they, the defendants, did not intend to pay in good faith to these five named people the moneys in question for trucking services and that they did not believe in good faith that such trucking services had been rendered to Paterno & Sons, Inc.

Finally the defendants argue that even if the truckers were non-existent and even if they may have known those truckers were non-existent, the government has not proved beyond a reasonable doubt that these truck rental expenses in approximately the amount in

question were not paid to some truck renters for expenses of this nature, and on this basis the defendants urge that they cannot be convicted for attempted evasion of taxes or false statements of business expenses or conspiracy to commit any violations of this nature.

The defendants have argued in this connection that the bills, the invoices that are in the exhibits numbered, with some omissions, 1-A to 47-A were in fact paid -- those amounts were in fact paid for required trucking services rendered to Paterno & Sons, Incorporated.

Now, as I have said, but as I think I must emphasize, in giving you that account of the respective contentions I have just touched for you in very brief terms on a portion of the arguments on both sides concerning this subject. I simply remind you of the important point, but for the last time, that it is your responsibility to consider all the evidence and all the arguments in undertaking to reach the serious decisions that you will be called upon to make.

Now, let me talk to you a little bit about another standard subject of jury charges, the subject of credibility. You have heard a fair number of witnesses. I have told you, all of us have told you that your solemn responsibility is to seek the truth. In seeking the truth you obviously

must make critical determinations about the witnesses you have heard and how far you can rely on each of them for an accurate account of the events about which they purported to tell you and that in many words is what lawyers and other people call the subject of credibility. It is not a technical-legal subject. Lawyers and judges don't have any special training for the determination of credibility. Our system assumes that a preferred way to answer such questions is to bring to the courtroom adult citizens like you to have them address their collective wisdom and judgment and experience to an appraisal of the witnesses and in that fashion to have these key problems of credibility fairly and justly resolved and you will undoubtedly be doing that kind of thing in the jury room.

You will be asking yourselves as you review the evidence how each of these witnesses impressed you. Did the witness appear to be truthful, candid, frank, forthcoming and forthright in his or her testimony, or did the witness seem evasive or reluctant or shifty or suspect in some way or other?

Did the witness appear to know what he or she was talking about and, very properly, did the witness appear to intend to give you accurately and fully an account of that knowledge? Was the witness consistent or self-

contradictory? How did the cross examination compare with the direct? You will ask yourselves this kind of thing and other things in assessing credibility.

If it is your judgment that any witness has been discredited to any degree, it is part of your sovereign authority and responsibility to give to the testimony of that witness such credit, if any, as your judgment dictates.

If any witness in your judgment has wilfully testified falsely on any material fact, it is within your power to disregard that witness' testimony entirely or to give it such weight and credence as your judgment indicates it merits in assisting you on your search for the truth.

You will remember, I'm sure, that no witness in our courts is entitled to any more or less authority because of his status or the status of the party that calls him. Specifically in a criminal case you will understand that because a witness is a government employee or is called by the government, he is not entitled to more weight or credence on that count. He is not entitled in advance to be discredited or given less weight on that basis. Each witness comes before you as a separate and equal individual until you have made your judgment about him and her as an individual and made your important

determinations as to credibility, and all that is simply a reflection of the basic principle we strive for, that all parties, public or private, government or non-government, come as equals to the courtroom.

Your task will be -- and I keep saying it because it is correct that you are sovereign on this -- to determine whether the defendants are guilty or not guilty on all or any of the charges against them.

In performing that task you must not permit yourself to be diverted by speculation or guesses or imaginings about punishment or possible punishment. If any one defendant is found guilty in our courts the question of sentence or possible sentence, if any,is one to be decided later on considerations that go beyond the trial record by the trial judge.

Just as the prime and basic question of guilt or innocence is for yu, the question of sentencing, if it is ever reached, is for me, so, as I say, you will not be diverted by speculation or guesses or hunches on that subject, if it should ever be reached in this case.

When you go to the jury room, which I guess will be after lunch now, you will have in mind that there are 12 of you, or there will be, and that the purpose of that ancient 12 member institution is the obvious one of having

you reason together. That means that each of you will
15/2 feel entitled and obliged to contribute your own opinion, your own wisdom to the collective deliberations. Each of you will at the same time, by the same token, be prepared to listen courteously and rationally to the views of your fellow jurors.

If you have an opinion at some stage that you are later persuaded rationally was wrong, you won't hesitate to change it in good conscience. If you have an opinion that you hold rationally and in good conscience you will not change it merely because at some particular point you are outnumbered or outvoted.

On every count, in order to return any verdict, I think you all know, but I remind you, you must be unanimous. Nevertheless, the unanimous verdict of a jury must reflect in the end the individual, rational determinations of each individual member of that jury exercising his judgment and following the dictates of his cautions.

If you find during your deliberations that you need to hear again any of the testimony, send us a note through Mr. Soto. We will find it as promptly as possible and have it read to you. If you need any exhibits, beyond the few that I happened to mention during the course of discussion that you should take with you, send us a note about that and

they will be gathered together and sent in to you. If you need to hear any of these instructions, which have been longer than any of us would have wished, but necessarily so, if you need to hear that again, send a note about that and we will help you in whatever way we can.

I remind you that you must make separate determinations as to each separate accusation against each separate and individual defendant.

The corporation and each of the individuals, Mr. Paterno and Mr. Denti, are named in Counts 1 to 5. Michael Paterno is named in Counts 6 to 8; George Denti is named Count 9.

Each of these named defendants with respect to each accusation calls for a separate decision, and if an when you have a verdict youwill be asked to deliver it in that way, separately for each, in the open courtroom to your foreman, Mr. Soto.

If in the course of your deliberations you have occasion to send us a note and you are at that point divided in your vote, do not report to us the score. Don't tell us how the division stands. That is a private matter for your deliberations and not one on which we need to intrude or are entitled to intrude.

Now delaying still further our taking leave of

our four alternate jurors and letting the twelve of you go to lunch, let me see if I need some additional things from counsel in the way of exceptions or additions.

Gentlemen?

(At the side bar.)

THE COURT: All right, who is first?

MR. BRILL: Age before beauty!

THE COURT: Okay, Mr. Rosenthal.

MR. ROSENTHAL: Mr. Brill -- I will have to preface this by saying that Mr. Brill tells me I am wrong, and it's quite possible I am but I want to be at least safe in this statement. The conspiracy count reads from 1965 to 1970.

THE COURT: 1973, isn't it?

MR. BRILL: No, 1970.

THE COURT: Up to the date of the filing, isn't it?

MR. BRILL: I beg your pardon, yes -- May 3rd.

MR. ROSENTHAL: It is my impression that the years 1965, 1966 and 1967 would be outside the statute of limitations, because I believe the statute on 371 is five years.

Your Honor in your charge told the jury that if they found any participation by any of the defendants for

a substantial period of the time alleged in the indictment -- and I think you read them the years at that time -- that they might find --

THE COURT: Let me stop you. If you really want me to go back and tell them that they must find after 1965, I will. I cannot imagine anything less helpful to you on this record.

MR. ROSENTHAL: I will withdraw it.

THE COURT: You do not have to withdraw it. I think you will hurt your client.

MR. ROSENTHAL: All right, I have not thought it out.

THE COURT: Now that you have thought it out --

MR. ROSENTHAL: I agree with you, Judge.

THE COURT: Now what else, Mr. Rosenthal?

MR. ROSENTHAL: That is all.

MR. BRILL: I am happy to say, Judge, for the second time in my whole professional career I have not a single exception to note.

THE COURT: Well, maybe Mr. Silverman can help.

MR. SILVERMAN: I have no exceptions.

THE COURT: Well, you are all asleep at the switch!

(Laughter.)

THE COURT: But we will go to lunch.

(In open court.)

THE COURT: The rules, ladies and gentlemen, under which we function, just to explain this seemingly peculiar and inhospitable step we are about to take -- the rules provide that before the jury retires the alternates must be relieved or dismissed -- I forget what the word is -- and since there must be 12 to retire, it is our habit, when this trial has been running for a couple of weeks, to keep the alternates to the last possible minute. It sounds ungracious, because the 12 who are about to retire go as guests of the government for a sumptuous lunch and the four alternates are going to be set loose in the harsh world on their own elsewhere, but, in any event, Mr. Kutner and Mr. Ghisoni, Ms. Sepulveda and Ms. Scott, since it is late and you all probably want lunch, I won't make a long speech to you but I just want to thank you all for your attention and your patience.

I know in at least one instance the service was a matter of some special hardship, and I hope Mr. Kutner has survived without undue injury, but I do thank you for staying with us.

Since the other 12 have survived, you are excused at this point.

Mr. Swanciger tells me if you go to Room 109

they will clock you out in due course, and your period of service will be ended.

Thank you again, and we will let you leave the courtroom.

(Four alternate jurors left the courtroom.)

THE COURT: For the rest, if we can have the marshals sworn, I think the plan is -- it is a little later than we expected for you to be taken to lunch. But then you will come back after lunch and proceed to deliberate. We will be on deck if and when you send notes.

If there are any delays in responding to your notes, let me just explain in advance, that it frequently happens that a jury's note gives rise to discussion or debate as to just what is the correct way to respond, and the delay will be used up in that kind of activity and not in ignoring it.

All right.

(Deputy marshal sworn.)

THE CLERK: The jurors may go to lunch.

(Jury left the courtroom at 1:55 p.m.)

THE COURT: Before we all go to lunch, first I think we ought to be allowed to excuse ourselves until 3 o'clock.

Does that make sense? I do not think they will be back before then.

MR. BRILL: I do not think anybody will quarrel with that.

THE COURT: Okay.

Secondly, I do not know which, if any of you, are unfamiliar with this sort of housekeeping arrangement, but Mr. Swanciger and I have a practice when there are jury notes, his reading them to me on the telephone, and then normally I have him read them to counsel while I am seeing whether any elevator can get me here. I will follow that, unless somebody objects to it -- the only exception being that occasionally I have him postpone reading the note because it has some special matter -- for example, the jury, as they sometimes do, in spite of my instructions, sends in his verdict in the note.

I always wait until I get down here before having it read. There may be other exceptions, but is that procedure agreeable with you all?

MR. BRILL: It is, your Honor.

MR. ROSENTHAL: Yes.

THE COURT: Okay, see you later.

(The following took place at 3:30 p.m.)

THE COURT: The note from the jury, marked Court Exhibit 2, calls for government form 1120 for four years. I take it you have agreed on that.

MR. BRILL: Yes.

MR. ROSENTHAL: Yes.

MR. BRILL: Actually we have five, I think, Judge.

THE COURT: Let's send all five in.

MR. BRILL: All right.

THE COURT: Cancelled checks, 1-A through 47-A. I guess they have that reversed in that 1 to 47 are the checks; is that right?

MR. SILVERMAN: Yes.

THE COURT: And they want the invoices, which are 1-A to 47-A.

MR. SILVERMAN: Yes.

THE COURT: No. 4, "The defense exhibit."

MR. SILVERMAN: It may be referring to the group of exhibits the Court instructed they take in with them.

THE COURT: Weren't they sent in?

MR. SILVERMAN: No, your Honor.

THE COURT: I instructed that those exhibits about which there was an exception by defense counsel, X something, and the question was as to whether they were

stapled, go in with the jury. I am sure that is what they are referring to.

MR. ROSENTHAL: They were lying right on Mr. Silverman's desk.

THE COURT: I construe the note to refer to that.

MR. ROSENTHAL: I don't know what they were referring to.

THE COURT: I rule that that is what they are referring to. I had assumed that is what they were referring to.

No.6, purchase journal.

MR. BRILL: We are not sure whether they are referring to the purchase journals for the years within the indictment or the purchase journals which your Honor received subsequent to the indictment.

THE COURT: No. 5 is cash disbursements.

MR. BRILL: Same thing.

THE COURT: Send them all in.

The next is No. 7 which says "and all checks in evidence."

Are you agreed on what that refers to?

MR.SILVERMAN: The only ones the government has are 180 and 181, 205 through 209.

MR. ROSENTHAL: I have in evidence two checks

of BC Trucking, K&L, that are in evidence plus the extra exhibits which you said you automatically wanted to go in.

THE COURT: Let's collect all the things which I have just identified and send them in.

MR. ROSENTHAL: I also have the photographs of the BC check.

THE COURT: They didn't ask for that.

MR. ROSENTHAL: I don't know whether that is included or not.

THE COURT: They didn't ask for any photographs of anything.

MR. ROSENTHAL: No.

THE COURT: Leave that out until it is asked for.

MR. BRILL: What does "all defense exhibits"mean, Judge? Does it mean plans, specifications or photographs or --

THE COURT: There was no reference on there to "all defense exhibits". No. 4 says "defense exhibit," and I have just determined, subject to another note, that that means the material that I had told them they were supposed to be taking with them in the first place, which was inadvertently not sent in with them. It is now being

sent in, responsive to this, and if it is not correctly responsive, unless this jury is different from all other juries, we will soon be hearing about that.

Have we got everything?

THE CLERK: Yes.

THE COURT: Send it in.

As long as we are here together, just keep our reporter's fingers limber and on general principles, let us make tentative plans for the balance of the day.

Specifically, let's decide whether we are going to keep the jury through dinner and on to bedtime or not. The issue is narrow for me. After a trial that has lasted about 10 trial days, according to my notes, unless we have a stipulation for a verdict by less than 12, I am going to sequester the jury until there is a verdict or a mistrial. I still offer the alternative of a stipulation, but I don't know if we can have that.

Do either of defense agree?

You would not agree to that?

MR. ROSENTHAL: I wouldn't. I wouldn't advise my client to. Naturally, it is up to my client.

THE COURT: I am willing to take your judgment on it unless your client causes you to withdraw it, in which case let me know.

I think that is a short subject, unless somebody wants to take a different view. I think we will send the jury to dinner at 7 o'clock, and if they have no verdict by 9 we will make hotel reservations for them.

Do we need to do it before then?

MR. SILVERMAN: If the Court does desire, and the government is in agreement with the Court, to sequester the jury, I suggest that if they have not reached a verdict at 7 o'clock they be allowed to make phone calls so that members of their family can bring night clothes with them because I don't think they are prepared for that eventuality.

THE COURT: I think that is a thoughtful and appropriate suggestion and I am going to follow it. The only question is as to the timing. I suppose if they have not got reason to convene before then I will come down about 6:30, have the jury in and tell them the program and allow that pre-dinner half hour for telephone calls and so on, or do you think it should be done earlier than that?

MR. SILVERMAN: No, your Honor, I think that would be appropriate.

THE COURT: Is that agreeable, gentlemen?

We will have the marshals making the phone calls.

MR. ROSENTHAL: Yes, not the jurors directly.

THE COURT: Right.

MR. SILVERMAN: Through the marshals. That is sufficient.

THE COURT: Are we all agreed on that, gentlemen?

MR.ROSENTHAL: I think so.

THE COURT: If we have not been brought together before that, I will see you at 6:30.

(Recess.)

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(At 5:15 p.m. the following note was received from the jury, reading as follows:

"Is it correct to say that Counts '1 through 8' are inclusive, and cannot be separated in regards to innocence or guilt, especially Counts 6, 7, 8.")

(Note marked Court's Exhibit 3.)

THE COURT: The note, which is Court Exhibit 3 has been read to you gentlemen.

MR. BRILL: Yes, sir.

MR. ROSENTHAL: Yes.

THE COURT: Of course the answer to the question is "no", it is exactly incorrect to say that they are "inclusive and cannot be separated" -- and I think you will all agree to that.

So I will call the jury in and tell them that.

Is it a good time to tell them their schedule now while we are here or not? I think we might as well and not have to drag them out again.

MR. BRILL: It might worry some of them, Judge, if they were told now.

If it is all right with you, and if your Honor is asking my preference, I would like to adhere to your Honor's original schedule.

MR. ROSENTHAL: I subscribe to that.

THE COURT: Okay. I do not agree with it but I will accept it.

MR. ROSENTHAL: Thank you.

(Whereupon, the jury returned to the courtroom at 5:25 p.m.)

THE COURT: I want to answer your note, ladies and gentlemen, to remind you whenyou wrote it: "Is it correct to say that Counts '1 through 8' are inclusive, and cannot be separated in regards to innocence or guilt, especially Counts 6, 7, 8."

The answer to that question is "no". It is not correct. Each count in law charges a separate crime, and each count in law must be considered separately with respect to each defendant named in any particular count.

Now I think it is also sensible to say that in some cases, as you sort out the facts, certain factual considerations will bear on more than one count, and that may well be true as you go through and study this case, but in order to do justice in making your analysis you must take each count and each accusation against each defendant separately and make your determination separately, and make sure that the differences in facts, whether the year involved or money or people, do not require different results.

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I think that is about the size of the answer.

Is there anything that any of you gentlemen wish to add to that?

MR. BRILL: No, sir.

MR. ROSENTHAL: No.

THE COURT: All right, please retire.

(Jury leaves the courtroom at 5:27 p.m.)

(At 6:30 p.m. the following proceedings took place in the absence of the jury.)

THE COURT: All right, I will call the jury in, tell them the schedule, and authorize them to make phone calls via the marshals, and let them retire until 7 p.m., at which time they will be taken to supper and we will all be notified; then we can all take an hour or so off.

(Jury enters the courtroom at 6:31 p.m.)

THE COURT: Ladies and gentlemen, we have all been together -- I think it is about ten days -- and you have all been devoting conscientious attention; and to all of us it is perfectly clear, and to those sitting here you are going to continue in that fashion. You are going to continue in that way and you are not going to compromise in your necessary duty.

We, in turn, owe you a number of duties, including a duty to inform you about the schedule of arrangements,

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and so on, and that is why I called you in at this time.

The schedule is as follows: Unless we have heard that you need something or want us before then, it is planned that you will all go out to dinner together approximately at 7 p.m.

It is planned that after you come back you will work together until somewhere in the vicinity of 11 p.m.

It is anticipated that if you work is not done by then, you will all stay together overnight -- not exactly together, but you will be taken by a bus to a midtown hotel where you will spend the night, and then return in the morning, the theory being that for a lot of very good reasons, especially in the case that has lasted for some days, it is desirable that the jury not separate but continue together during the course of its deliberations.

Although dinner is at 7, we thought it desirable to call you in a little before then, because all of you have family or people with whom you would want to be in touch.

You are permitted to give messages to the marshals, to communicate with anybody you want to communicate on your behalf.

If you would like to make some arrangements for some things to be brought to you for your very possible

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overnight stay, youmay indicate it, that is, I think the marshal --

Will you be able to tell the jury where they will be staying at this early hour?

DEPUTY MARSHAL: Not right now. We have to make arrangements first for a hotel.

THE COURT: All right. I would like to request that you do that even if it is only tentatively, as soon as possible; and perhaps then, if any member of the jury does want anything brought to him, the arrangement ought to be that whatever it is be brought to him at the hotel.

Can that be worked out?

THE MARSHAL: Yes.

THE COURT: All right. I am sure the marshal will do that.

Of course the length of your deliberations is a matter within your control, and, as I said, I am sure you will not let it be affected by this further prospect of additional inconvenience.

When I outline these prospects it is simply so that you will know what is in the cards, assuming that you go through the evening as may well happen.

Does anybody have any questions about the personal arrangements?

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(No response.)

THE COURT: All right, then let me request that you retire again. We will stay available, and when you are taken out for dinner you will be notified, and we will go out, too, and we will be back, certainly not later than the time of your return.

Will you please go back to the jury room.

(Jury left courtroom at 6:35 p.m.)

THE COURT: All right, gentlemen.

(At 9:40 p.m. the following note was sent in by the jury, reading as follows:

"What was Gov'ts Exhibit #204 and 210? If we don't already have it -- please supply to us.")

(Above exhibits sent in.)

xx (Jury note marked Court's Exhibit 4.)

THE COURT: The last note inquiring about Exhibit 204 and 210 -- which note was marked Court's Exhibit 4 -- I understand you have all taken care of by agreement.

MR.BRILL: Yes, sir.

THE COURT: Then I will just make a record of your having done that in my absence.

It is now getting to be about 10:30. It has been a fairly long day for the jury and for those of us who are

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old.

So I figure we ought to totter on home at this point. I am going to suggest that the jury be brought back at 9:30 in the morning, if that is agreeable, and have them just retire to the jury room whenever they arrive and proceed to resume their deliberations.

MR. SILVERMAN: Yes, your Honor -- just one question.

I do not know whether it was Mr. Rosenthal or Mr. Brill had asked me what the Court suggested we do with the exhibits that they requested and that are already in their room.

THE COURT: Can we lock the jury room?

THE CLERK: I can lock it and put a note saying "Stay undisturbed".

MR. ROSENTHAL: Judge, if I may interpose, I have used the washroom facilities of the jury room long after the jury has left during the week, and that place gets pretty dirty -- it is apparently a small place.

THE COURT: So you think it should be in here?

MR. ROSENTHAL: I think the jury room should be left open so that at least if there are cleaning people they can clean it up, otherwise it would be bad.

THE COURT: Well, let us bring them in.

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MR. ROSENTHAL: Could it be locked in the robing room?

THE COURT: What have you been doing with your exhibits overnight -- taking them away?

MR. ROSENTHAL: Most of them are there -- they had a carriage over there.

THE COURT: Oh, you have been taking them back to your office.

MR.SILVERMAN: Yes, your Honor.

THE COURT: Well, why don't I request Mr Ayres, perhaps you will help Mr. Swanciger, and Mr. Silverman.

MR.BRILL: You know we will cooperate.

THE COURT: There is a cabinet in the robing room. Maybe you can put them in there.

Okay. Then we will have them redelivered the first thing in the morning.

MR. BRILL: Would it change your Honor's schedule if we came at 10 tomorrow instead of 9:30?

THE COURT: It would not especially change my schedule.

Why don't we compromise -- have them come at 9:45. If you happen to be five or ten minutes late -- I am not encouraging you to do it -- but I suspect it will take an extra five minutes for them to find a paper

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for a note.

MR. BRILL: I usually get here about 9:30 but I would like to feel not that extra pressure.

THE COURT: Okay.

THE CLERK: The jurors want another five minutes.

THE COURT: I guess you heard or overheard the report that the jury asked for a delay of five minutes or so -- the information they seemed to give to the marshal is that they may be approaching a verdict, so I guess we should give them the five minutes.

(At 10:45 p.m. the following proceedings took place:)

THE COURT: This note, which will be marked as the next court's exhibit, says:

"One or more jurors has stated that he will not change his mind in a position that is contrary to the other opinions. Does this constitute a hung jury?"

Well, I think at this hour I will just say "no" and send the jury to bed.

Is that agreeable to everybody?

MR.SILVERMAN: Is your Honor intending to give the Allen charge in the morning before they start deliberating?

THE COURT: No, I would wait some more -- I think

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I would say just a little more than "no" at this point. I will say that jurors commonly, at a relatively early date in their proceedings, find themselves in disagreement. I will remind them of what I said about their duty to pay attention to each other and reason together, and we expect them to proceed on those lines tomorrow morning, and then suspend for the day.

xx (Jury's note was marked Court's Exhibit 5.)

(Whereupon, the jury returned to the courtroom at 10:50 p.m.)

THE COURT: We have your note indicating that you are, as of now, not unanimous, and your question whether this constitutes a hung jury.

The short answer to the question is "no". All this means to us at this time is that at this relatively early stage in your deliberations, considering the length of time the case took and the brief number of hours that you have been deliberating by comparison, it means that you are not unanimous, and this is not an uncommon experience. It is late, and you have had a long day.

At this point again, still in response to your note, I am simply going to remind you of some of the things I said towards the end of the instructions, that the task of people involved in this somewhat peculiar and somewhat

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unique situation in our country, the jury system, where we have 12 people undertake to arrive at a unanimous decision on serious questions, the task of such people is to deliberate and reason rationally together, with a purpose to seek to expand andsupport your own point of view, and with a purpose to be receptive and understanding on either points of view, and by that give-and-take it is hoped -- and in a great majority of cases the hope is realized -- that the end product will be a unanimous judgment that can fairly be taken as a just judgment in solving matters like this involved in a criminal case.

So while there is no occasion for discouragement, there is also no justification, of course, in light of what I told you, and that is in light of what the law tells us, for any juror or jurors to set his or her mind or minds in a closed position that is intractable, no matter what that is -- that is the opposite of the kind of deliberations I undertook to describe to you earlier this afternoon in talking about the function of the jury. But it is very late, and I am sure you are all tired and worn out.

There is a bus or buses waiting for you to be escorted to your hotel. We have arranged that the exhibits you have had with you in the jury room will be removed for safekeeping but delivered back to you the first thing in

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the morning when you will reconvene.

We will arrange that you will have breakfast in time to be back here at 9:45.

When you come back you are requested and directed to resume, we hope, with somewhat fresher spirits and fresher outlooks the deliberations you have been engaged in this afternoon.

Let me say I hope you have a pleasant evening and that we will see you in the morning as soon as you indicate some reason for us to be together. When you first get back to court we will dispense with any ceremonies or rituals; we will ask you to commence your deliberations.

JUROR NO. 11: May I speak to the foreman?

THE COURT: You mean privately?

JUROR NO. 11: Yes.

THE COURT: Yes, I guess so.

(Juror No. 11 confers with the foreman off the record.)

THE COURT: Is there anything else that we need to talk about.

THE FOREMAN: It is about a note that he gave me this afternoon, so I will bring it back tomorrow morning.

THE COURT: All right.

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Why don't we, because of the lateness of the hour, and in order to avoid your being put in the situation of sort of half deliberating in the open courtroom, which is not the place for it -- why don't you stop at this point.

As soon as you have any communications in the morning, send them in in the usual way and we will attend to them as promptly as possible.

Let me bid you all as pleasant an evening as possible.

Goodnight.

(Whereupon the jurors left the courtroom at 10:55 p.m.)

MR. BRILL: Your Honor, may I please have read back what the foreman said?

MR. ROSENTHAL: I did not hear it either.

(Record read.)

THE COURT: Do you think you can constrain yourself until tomorrow, Mr. Brill?

MR. BRILL: I will have to.

THE COURT: It did not excite me very much.

MR. BRILL: It did not excite me either, but I thought I ought to find out about it.

THE COURT: Okay; 9:45 tomorrow, then. Goodnight.
(Recessed to February 22, 1974, at 9:45 a.m.)

February 22, 1974

(Jury present at 9:45 a.m. and continued deliberations.)

(The following occurred at 10:30 a.m.)

THE COURT: We have two notes.

"Recharge the jury on Counts No. 6, 7, 8 and 9."

Our able reporter has the transcript here and my own preference, and perhaps the pleasure of the jury would be better served by allowing our reporter to read it this time rather than me.

Is there any objection to that?

MR. BRILL: No, none, sir.

MR. ROSENTHAL: No objection.

MR. SILVERMAN: The only problem I see with that is that I think it would be just a little more interesting to them and they might understand it better if it was coming of your Honor's mouth, being read to them by your Honor. I think it might be more intelligible that way to them since it has already been done once.

The Court might not see the necessity to go over some of the details that it explained the last time that in its judgment it might leave out.

THE COURT: Well, I have done it at them once.

I would just as soon listen to it this time.

Do defense agree with Mr. Silverman or --

MR. BRILL: No, your Honor, I think that your Honor's suggestion is appropriate and it is one with which I happen to be more familiar than Mr. Silverman's suggestion.

THE COURT: Do you have copies of this transcript, gentlemen?

MR. BRILL: No, sir, we do not yet.

THE COURT: I believe that as we do with other things, we can safely risk relying on the essential accuracy of the way the reporter got this without my checking it in advance or anybody else's checking it in advance. With this many lawyers carefully watching in the room I would just as soon assume that at any point where it is thought we need a correction one of us will interrupt the reading and make it right on the spot, so I am fumbling through to find the first page in this.

I will ask the reporter to start reading on page 1813 at line 23 and continue through line 3 on page 1824.

As I say, all of us will listen. If anybody feels a correction is required, please sing out and I will do the same.

MR. SILVERMAN: With reference to the other message, I believe I'm correct in assuming that we are all

in agreement that each defendant will be considered separately as to each count and each count considered separately.

THE COURT: Yes. That note has not been marked, but that will be marked as the succeeding court exhibit.

(Court Exhibits 6 and 7 were marked.)

THE COURT: In addition, gentlemen, to underscore, I am going to instruct the jury that if at any time they have a verdict on any defendant on any count, though it is not a verdict of all counts, they may record a partial verdict.

Now I think we can have the jury in.

(Jury present at 10:35 a.m.)

THE COURT: Good morning. To help you look on the bright side, it occurred to me that in your situation you didn't have to wait on a line for gasoline this morning as I had to do, so everything has its compensations.

You have asked for a recharge on Counts numbered 6, 7, 8 and 9.

To give you a somewhat improved voice, at least, we are going to ask the reporter to read that portion of the charge to you. None of us has checked the transcript which came rapidly off the typewriter overnight, so that we all will feel free to interrupt if at any point we think there may be a typographical or other error. But other than

that we will have that portion of the instructions read to you, as I say, by the reporter.

As to your other note, you say "In considering Counts 2 through 5 do we decide upon the three defendants together as regards each charge or do we consider each defendant as regards each count, i.e., can we separate defendants?"

Now, I want to stress to you again that the answer is you can and you must separate defendants in the sense that you must consider each defendant on each count separately and individually. That means that if your judgment of the facts leads you to one verdict as to one defendant and a different verdict as to another, you are to report that, and that is true throughout the indictment.

I might say it is true on Count 1 through 5 in which the three defendants are named, and it is true with respect to each count throughout the indictment as to each individual defendant.

To stress that a little further and for all I know, perhaps to help you a little bit in your deliberations, let me also say that if in the course of your consideration of this case you arrive at a verdict as to any one or more defendants as to any one or more counts, less than all of the counts, you may send us a note and report that

partial verdict as far as you have reached.

In other words, if you have a verdict on any count respecting any defendant you may let us know that you have such a partial verdict and you may come out and deliver it to us.

Now, with that I am going to ask our reporter if he wil read to you the charge on Counts 6 through 9.

MR. ROSENTHAL: My impression was -- I haven't seen the note, but my impression was that the jury had asked concerning Counts 6, 7 and 8.

THE COURT: Yes, you are entitled to have that impression. I am sure it is a misunderstanding since I have the note before me.

MR. ROSENTHAL: That is right.

THE COURT: It says 6, 7, 8 and 9.

MR. ROSENTHAL: I didn't hear that.

(Record read.)

THE COURT: All right, I think that covers the notes yousent.

Let me ask that you retire again and we will be on hand when you need us.

(Jury left the courtroom at 10:55 a.m.)

THE COURT: We will ask the marshals, if we get to that point, as we well may, to schedule lunch about 1.

The jury room here is not a very attractive one. Sometimes we arrange to have lunch brought in for the jury. I see some of you gourmets shaking your heads.

MR. ROSENTHAL: That jury room has no air in it, no windows, and I think any juror deserves better. It is almost like the hole that has been described in various jails throughout the country.

THE COURT: I agree with you.

(Recess.)

(The following occurred at 12:20 p.m.)

THE COURT: Have you heard the note, gentlemen?

MR. BRILL: Yes, sir.

THE COURT: The note has been marked Exhibit No. 8, Court Exhibit No. 8, so the record will show what I am talking about.

The answer seems to me to be, very simply, that the jury ought to consider that it has enough trouble worrying about what it is supposed to worry about without speculating about why it doesn't have other things to be worrying about.

Anybody have any different views?

MR. BRILL: That is essentially it, Judge. It is not in the case.

MR. SILVERMAN: No, not that it is not in the case,

but those particular counts relate to what they relate to. Those three exhibits relate possibly to Count 1, since it is in those years, and it doesn't relate to Counts 2 through 5.

MR. BRILL: That doesn't answer the question.

MR. SILVERMAN: Mr. Brill's terminology, "It is not in the case" is what I have objection to. I agree with what your Honor said.

THE COURT: I have trouble remembering what I said myself. Let's have them in.

MR. SILVERMAN: That is fine.

(Jury present.)

THE COURT: In response to your note, ladies and gentlemen, the nature of the correct answer to your question requires that I be fairly brief in giving you the answer. It is not meant to be curt, it is mean to be brief because after conferring briefly with counsel it has seemed to me and to us that the shorter the better. The answer to your question "Why did the government not include the year 1966?" is simply that you ought not to use up your time speculating about things that are not included. You've got a 9-count indictment before you. Any evidence that has been allowed to be placed in this record may be considered by you in light of the arguments

and my instructions for any bearing it may have on the questions that have been placed before you for decision, and, as I said, it is an inefficient and diverting use of your time to speculate about things that appear to you to be not in the indictment.

So, with that, let me ask you to retire once again. I guess you have been informed or did I say earlier it is planned that your lunch will be about 1 o'clock.

(Jury left the courtroom.)

(Court Exhibit 8 was marked.)

(Recess until 12:35 p.m.)

THE COURT: The jury has sent in a note reporting a verdict. It will be marked as the next court exhibit. It states in writing, as our juries frequently, in spite of my instructions not to, report it that way. It says they have found the defendants guilty on all counts.

I think I will ask the clerk to have the foreman place the verdict on the record orally, notwithstanding this written report, and I think I will ask Mr. Swanciger to take it defendant by defendant.

Will you do that?

THE CLERK: Yes, sir.

THE COURT: And I will explain to the foreman that we are planning to do it that way.

All right, have them in.

(Jury present.)

THE COURT: We have your note and the report of a verdict. I am sure you know that it is common experience that certain formalities become engrained in the courthouse and in some ways some of these formalities serve the purposes or are thought to serve purposes, so I am going to ask you to follow our formalities and have your foreman, Mr. Soto, though you have said it in a note, repeat the verdict orally and I will ask the clerk of the court, Mr. Swanciger, in our accustomed way, to ask you for the verdict orally, and although it will take a couple of minutes, he will ask you to deliver it with respect to each defendant separately with respect to each count that that defendant is named in.

THE CLERK: Mr. Foreman, have you agreed upon a verdict, sir?

THE FOREMAN: Yes, sir, we have.

THE CLERK: As to defendant Michael Paterno, what is your verdict as to Count 1?

THE FOREMAN: Guilty.

THE CLERK: Count 2?

THE FOREMAN: Guilty.

THE CLERK: Count 3?

THE FOREMAN: Guilty.

THE CLERK: Count 4?

THE FOREMAN: Guilty.

THE CLERK: Count 5?

THE FOREMAN: Guilty.

THE CLERK: Count 6?

THE FOREMAN: Guilty.

THE CLERK: Count 7?

THE FOREMAN: Guilty.

THE CLERK: Count 8?

THE FOREMAN: Guilty.

THE CLERK: As to the defendant George Denti, what is your verdict as to Count 1?

THE FOREMAN: Guilty.

THE CLERK: Count 2?

THE FOREMAN: Guilty.

THE CLERK: Count 3?

THE FOREMAN: Guilty.

THE CLERK: Count 4?

THE FOREMAN: Guilty.

THE CLERK: Count 5?

THE FOREMAN: Guilty.

THE CLERK: And Count 9?

THE FOREMAN: Guilty.

THE CLERK: As to Defendant Paterno & Sons, Inc. what is your verdict as to Count 1?

THE FOREMAN: Guilty.

THE CLERK: Count 2?

THE FOREMAN: Guilty.

THE CLERK: Count 3?

THE FOREMAN: Guilty.

THE CLERK: Count 4?

THE FOREMAN: Guilty.

THE CLERK: Count 5?

THE FOREMAN: Guilty.

THE CLERK: Thank you, members of the jury.

Listen to your verdict as it stands recorded: You say you find the defendant Michael Paterno guilty on Counts 1 through 8; defendant George Denti guilty on Counts 1 through 5 and Count 9 and the defendant Paterno & Sons, Inc. guilty on Counts 1 through 5, and so say you all.

MR. BRILL: I askyour Honor to poll the jury, please.

THE CLERK: Members of the jury, listen to your verdict as it stands recorded:

You say you find the defendant Michael Paterno guilty on Counts 1 through 8; the defendant George Denti on Counts 1 through 5 and Count 9; the defendant Paterno &

Sons, Inc. guilty on Counts 1 through 5.

(In answer to the question "Is that your verdict?" all jurors answered in the affirmative.)

Now, ladies and gentlemen, I am not going to keep you. I am going to thank you. I am not going to thank you for the way you decided because that would be inappropriate and inconsistent with what I have been telling you throughout, that the verdict is your sovereign business, and I will be thanking you however your judgment led you to decide this case. I am paying you as an officer of the Court for all the patient and devoted and serious service you have rendered in our joint task of administering justice here. All if us have been aware that this has been more than a normally arduous period of jury service for you. I think all of you or most of you have gone over the normal duration of such service and we are not unaware of the sacrifices you have made in performing that service.

I think I am free to express the hope that you have been rewarded in some measure by a sense of participation in serious public affairs. I think I have mentioned to you before that there are many people elsewhere who think our system peculiar and it is peculiar in the sense that most other countries don't have it, the system of

having ordinary citizens who are not professionals or bureaucrats do this critical work of decision making in the critical area of the criminal law. We believe in it and if it works it works because devoted people like you make it work and I thank you for that and I hope you have some sense of gratification for your participation in this business.

Your certificates of service will be mailed to you. Your term of service, I'm told, is ended. You timed this so that you can't be the guests of the marshals for lunch, but again we thank you. We wish you well and bid you good afternoon.

(Jury discharged.)

(Court Exhibit 9 was marked.)

THE COURT: Are there motions or any other applications at this time?

MR.BRILL: I would ask your Honor's permission to reserve motions to the date of sentence, but the present application would be to continue the existing bail conditions.

MR. ROSENTHAL: I make the same applications.

MR. SILVERMAN: No objection.

THE COURT: The bail is continued. The motions may be reserved to the date of sentence.

I think you know, Mr. Brill, and I will inform

Mr. Rosenthal, that if there are motions of any consequence that you propose to make you are to make them in writing and substantially in advance and not pro forma. I don't insist that you make them but I suggest you do that if you really have problems that you think deserves serious consideration.

All right, we will order a pre-sentence report and we will set the sentence down for about eight weeks hence. We will set the sentence down for April 10th at 9:45 a.m. in Room 10, and without opposition the defendants are continued on their present bail status.

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United States of America

v 73 Cr. 410

Michael Paterno, George Denti
and Paterno & Sons, Inc.

Before: HON. MARVIN E. FRANKEL, D.J.

Date: April 10, 1974 - 9:45 a.m. - Room 102

For the Government: J. Lawrence Silverman, Esq.

For Defendant Michael Paterno and Paterno & Sons, Inc.:
Joseph E. Brill, Esq.

For Defendant Denti: Gilbert Rosenthal, Esq.

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(Case called.)

MR SILVERMAN: The government is ready.

MR. BRILL: Yes, your Honor. May I first, with your Honor's permission, move to set aside the verdict heretofore rendered by the jury and for judgment of acquittal pursuant to Rule 29 on each of the counts on which a verdict was returned.

THE COURT: The motion is denied.

MR. BRILL: I likewise, your Honor, move to set aside the verdict on each count and for a new trial pursuant to Rule 33.

THE COURT: All right, that is denied.

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MR. ROSENTHAL: May I on behalf of the defendant George Denti move similarly and make the same motions that Mr. Brill has just made in behalf of his clients?

THE COURT: Yes, Mr. Rosenthal, that motion is likewise denied.

MR. BRILL: Your Honor, at about 9:30 this morning Mr. Rosenthal and I were each handed copies of a letter, dated April 10, addressed to your Honor.

THE COURT: Mr. Brill, let us just wait a second. I will hear you, but let us go in a kind of order and I will hear all of your submissions together so please be seated just for a moment.

MR. BRILL: Yes, your Honor.

THE COURT: I just want to set this unpleasant scene and hear you each in turn, which is more helpful to me and I assume to your clients.

I think you all know that I have read detailed pre-sentence reports and I believe that counsel have seen those.

MR. BRILL: Yes.

THE COURT: I have had on behalf of each of the individual defendants a substantial volume of mail from people of relative prominence or success in the community and from more humble people, all speaking glowingly and

eobr 3

sympathetically of these defendants and urging leniency and I have certain taken those into account after, of course, reading them all.

In addition, I have, as Mr. Brill was about to note and speak about, a written recommendation from the government signed by Mr. Shaw, attorney in charge of the Organized Crime Strike Force.

Of course, I presided at the trial. I heard character testimony as well as the evidence that convinced the jury that these defendants were guilty as charged beyond a reasonable doubt and that brings us to where we are now.

I will hear counsel in turn, Mr. Silverman, defense counsel and I will hear the defendants.

MR. SILVERMAN: The government has nothing further to add than what is included in the probation report and what is included in the letter dated today.

THE COURT: All right, Mr. Brill, now, if you will.

MR. BRILL: I say with your Honor's permission that I am taken aback somewhat by the contents of the letter which bears today's date addressed to your Honor to which your Honor referred a moment ago.

I must say that considerations 2 and 3 supporting

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or purporting to support the recommendations come to me as a complete surprise not only because of --

THE COURT: Let me interrupt you. In a different case where it seemed to me to have a more central bearing, information of this kind would require exploration. I would invite the defendants to admit or deny the assertions. If they were denied, I would either disregard them or hold an evidentiary hearing and invite the defendants or others on oath to testify in response to these allegations after I had heard testimony in support of them.

In all the circumstances of this case, for reasons that would take longer to spell out than I have time to give to this particular topic, I will simply state to you that I am entirely disregarding the assertions in paragraphs 2 and 3 of the government's letter. I am not in stating that being critical of the government for making those assertions.

Sentencing is, after all, a highly informal and sometimes unruly business and the Supreme Court so far as sanctioned here and other debatable materials for sentencing and I certainly have no intention of criticizing either the Supreme Court or the prosecution in this case, but in the exercise of discretion in the particular circumstances before me, I repeat, that I give no weight whatever to the

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assertions in paragraphs 2 and 3 of the government's recommendation and insofar as the ultimate sentencing recommendation of the government would appear to rest in part on those assertions, I will assume that even as a recommendation I ought to consider it somewhat at a discount for that reason, but you now may go ahead.

MR. BRILL: In view of your Honor's statement, there is no need for my addressing myself to those considerations and I shall pass on to the other matters.

THE COURT: I think you should have in mind that the government has made what is intended to be and is taken to be a solemn and responsible recommendation taking into account all the circumstances, including those that I am eliminating, and you should have them in mind as you proceed.

MR.SILVERMAN: Excuse me, your Honor, may I just make a statement on that at this time. I wasn't aware of the Court's opinion on that.

As far as the Court discounting the government's recommendation due to its elimination of points 2 and 3, I don't think that is fair, your Honor, in that the government recommendation is based upon point 1 and whatever is included in 2 and 3 only lend support to what the government's recommendation is. The Court should not

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discount the government's recommendation due to its elimination of paragraphs 2 and 3.

I may add at this point, your Honor, that when Mr. Brill says that this matter comes to him as a complete surprise, that is not accurate, your Honor, because just subsequent to indictment I discussed this matter informally with Mr. Brill, the contents of paragraph 2, and the government's belief in that area so whether Mr. Brill says it is true or untrue is another matter, but whether it comes to him as complete surprise is not accurate, your Honor.

MR. BRILL: I don't think that this is the time for me to get into a debate as to my veracity, your Honor. If your Honor thinks it is, I will undertake to deal with it.

THE COURT: Look, let me cut this off.

It is not useful to bandy words whether I am going to discount the government's recommendation or not. The responsibility for imposing sentence is mine and I am going to consider what the government has said. I have told Mr. Brill to consider it and whether paragraphs 2 and 3 would change your view if eliminated is not a matter of great consequence to me at this time.

In any event, however you characterize what

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I am doing, paragraphs 2 and 3, whether they are a surprise to Mr. Brill or have been items of knowledge he has cherished since boyhood are of no significance to me.

Okay.

MR. BRILL: Thank you.

Your Honor was kind enough to let me read the presentence report and essentially, although I don't quarrel with the version in the main presented by Mr. Silverman to the probation officer as reflected by the report, the distinct impression which I am left with is that this is a case upon which Mr. Silverman's office stumbled in connection with an in-depth and I quote that, your Honor will recall it was testified to by Agent Rizzo as being the kind of investigation that he conducted, in connection with two employees concerning whom other allegations are made, but not in respect of the transactions which are charged in the indictment and which was tried before your Honor and concerning which the verdicts were found.

Unfortunately, the reference to the impact of this conviction, although your Honor has made some references to it by reason of the character evidence, the letters of recommendation which have come to the Court both directly and through the probation officer and from all of the sources from whence those letters came

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do not also reflect that approximately 150 to 200 individuals whose employment I daresay in the main depends practically entirely upon the continued ability of Michael Paterno to conduct this business which from very, very humble beginnings, after two earlier attempts, when he got out of the college and was awarded his degree as an engineer, failed and notwithstanding those failures Mr. Paterno did discharge all of the obligations which had been incurred during the course of the conduct of those two earlier ventures.

Some 18 years ago when this company was formed it was started, as your Honor knows, from the probation officer's presentence report on a very modest basis with borrowed moneys from one of Mr. Paterno's creditors. I think the sum was $5,000 from the current company. It grew by dint of his application to the job, his ability to provide the kind of services which your Honor will recall were satisfactorily performed in all details at prices less than other contractors bid for the same kind of work.

These employees, who I believe are reported to earn in the neighborhood of approximately $25,000 a year, are people who might be able to get other jobs, but they, some 150 to 200 persons, together with their families, are presently totally dependent upon Michael Paterno's

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activities in the direction of this business.

He oversees by reason of his technical knowledge the preparation of the estimates, the preparation of the bids and the financing of the work that is done, the management of the joint enterprises, which it is necessary for him to engage in in order to get the additional appropriate financing to do the job, and to look aside fromthat result, which necessarily follows in the event of incarceration, is to disregard a highly significant fact.

True, he did not consult with these persons to whom I make reference with respect to details concerning which the subject matter of the indictment was involved and I would make no representation to your Honor that he did. It would be incomprehensible and totally unbelievable to suggest that Michael Paterno in the course of his job talked to laborers on their job in connection with what was charged by the grand jury.

What is true is that at this painful time in the course of any case and one which I know weighs heavily upon all of the officers of the court, including the Court itself, there are fundamental considerations which must be taken into account.

I think it would be in the nature of being presumptuous for me to suggest what are those fundamental consider-

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ations to your Honor especially in view of your Honor's very careful and detailed consideration of the whole problem of criminal sentences, but I think that I would be remiss if I did not point out that in this particular case, and I don't propose and I know your Honor could easily respond to me in saying, well, then don't mention it, but I don't propose to make comparisons of any kind because I think we are all agreed that not only are comparisons odious, but the stench that flows from the comparisons that are made in no way lessens what-ver taint may have been involved in that which the jury has found to be by their verdict the conduct of these defendants.

It seems to me that to suggest that incarceration for purposes of punishment could never attain the level of measurement of punishment suffered by Michael Paterno in the prison of his own mind. Since the filing of this indictment, when he was faced formally with these charges approximately a year or so ago, he has had to live with the prospect of what will eventuate from these charges.

He has now come to the realization that he is confronted with the possibility not only of incarceration, but with the total destruction of everything he has worked for since his very humble beginnings and the hard work that he has devoted himself to performing over a period of

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some 25 or 26 years.

How could, it seems to me, the appropriate question to be posited, how could it be suggested that incarceration would affect rehabilitation of a man who in the light of his circumstances,his education, characterized as sincere, straightforward and cooperative, be expected the flow from the imposition of a prison sentence? What could make Paterno learn in prison that could in any way benefit either him or society?

I think that for myself I must say that I find it difficult to find an answer that could satisfy anybody on the basis of reason and conscience.

Will the incarceration of Michael Paterno deter others from the commission of similar offenses? This may be a sad commentary, your Honor, upon our present state of our civilization and culture, but I am afraid not and I say this with all candor. I don't believe that by reason of any prison sentence which your Honor having the authority to impose might impose would in any way deter any other person, any single person from the commission of a similar offense.

The net result of a prison sentence would only be felt by Michael Paterno, who I think has by his own conduct exhibited a sense of understanding of the significance of what has happened andhis family and friends who

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have for a lifetime leaned upon him, relied upon him and looked upon him as a man to whom they could come to for succor or advice or employment, for understanding and sympathy.

It seems to me that at a time like this the whole man must be taken into account and all of his efforts, including those which are set forth in considerable detail in the presentence report,his background, the manner in which he worked his way through school, his service in the military during World War II, his own conduct, the fact that he has had no prior conflict with the law and I believe that your Honor can be assured that it is hardly likely that he every again will be in conflict with the law. All add up to the sum that Mike Paterno is entitled -- I withdraw that, your Honor, because I think that is a judgment and I don't think I have the right to make the judgment, I can only urge and make a recommendation, but all add up to the point where I think your Honor in good conscience could make the judgment that incarceration in a prison will neither serve the ends of justice nor accomplish any of the purposes for which prisons and whatever fault I state they may be still exist.

I respectfully urge upon your Honor the highest considerations for clemency and I think that I would

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again fail in my obligations as an officer of this court if I didn't say to your Honor that in my honest opinion and belief Michael Paterno should not be sent to jail. I think your Honor can have the confidence that if sentence is suspended, I believe that your Honor will impose a fine, and he is maintained under surveillance by your Honor's probation officer. He will be able to continue to perform the kind of job that he as a good citizen can perform and should perform and be of great use not only to the community and society as a whole, but to that large number of people who are actually totally dependent upon him.

I thank your Honor for your very careful consideration of the matter and for giving me your indulgence in listening to me.

THE COURT: Thank you, Mr. Brill.

Mr. Rosenthal.

MR. ROSENTHAL: If it please your Honor, among the other documents that were submitted to the Court in behalf of George Denti was a presentence report or memorandum prepared by our office in his behalf. That memorandum traced at great length his humble beginnings, his early employment, his early life and his finally attaining the position that he holds today.

I don't believe that I can add at this time

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anything to that report.

THE COURT: I didn't mention it specifically, but of course you will understand that I have read it.

MR.ROSENTHAL: I am certain that you have, your Honor.

I know your Honor has also stated that your Honor is not taking into consideration items 2 and 3 of the letter that was submitted this morning by the government. I am certain your Honor means that.

On the other hand, it must have made some impression upon the Court and I will not say that it came as a complete surprise to me at least in respect to Item 2 because of the fact that in the 3500 material that we were privy to, it was indicated by Mr. Rizzo, I believe, that he originally had gone there in connection with an investigation as to the employment of Mr. Sadata and he made inquiry --

THE COURT: Look, there was a Judge here once who was asked to strike some testimony and then he was asked to declare a mistrial because he couldn't eliminate the impact of the prejudicial testimony on his mind even though he had stricken it and in an effort to reassure counsel, he said, "I assure you that it has not affected me consciously and it has not affected me unconsciously." I am not as perceptive as that judge. I don't know about the

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unconscious. I assume you don't either, the best I can tell you is that weighing all the things in this case, it seems comfortably clear to me that paragraphs 2 and 3 and I might say a couple of similar passages in the pre-sentence report are going to play absolutely no part in this sentence.

Now, if you are concerned about that and you feel that there is some subliminal or unconscious effect, I don't suppose it is rational to expect that you are going to eliminate it by dwelling on the subject. I am not going to cut you off any further, but I give you my view of my situation and then, since you are Mr. Denti's lawyer and I am not, you may take that into account and do for him whatever you think is appropriate in the circumstances.

MR.ROSENTHAL: In view of the statement just made by the Court, by your Honor, I will not dwell on it any longer.

However, I was about to say that something similar in respect to item 2 was already in the probation report, which was submitted to the Court.

THE COURT: I saw that and I have not forgotten it. There is a reference to Mr. Denti's brother.

MR. ROSENTHAL: That is true.

THE COURT: I have not forgotten it. That would be

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less than the kind of candid expression I owe you. I just don't think it is going to play any part.

I saw what it said. I don't feel that I am permitted on this record, unless I pursue it further, which I don't plan to do, to give it one iota of weight.

Now, people have said things about you and about me and we have heard them and they are said. If they are not true, they are not weighty. One doesn't forget them, but one may assign them no weight. That is the best I can tell you.

MR. ROSENTHAL: That is good enough for me, your Honor.

In respect to the defendant George Denti, frankly, did not know him until maybe three to four weeks before this trial and during that period I did get to know him quite well and as has been suggested in our memorandum, he is a person far more sensitive and much finer than his physical appearance would cause one to believe at first blush.

I think that the letters that have been submitted to the Court and as I recall it in respect to George there weren't any letters from any high places. There were preimarily letters from people of the same social strata in which he has lived and does live and there were letters that were written from the heart.

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None of them were prepared by our office nor were the outlines suggested by our office and they were truly the expressions of the people that wrote to the Court.

Your Honor is also aware of his physical condition and the fact that he does suffer from infectious arthritis, although frankly I had never heard of infectious arthritis prior to receiving the report from Dr. Bernstein.

Your Honor knows that he also suffers from gout. The arthritis, as I understand it, and this I can sympathize with because I have had a similar experience, originally originated and came from trauma in that he had been injured while working as a construction worker in connection with the operating of the crane.

The home that is in Sommers, New York, the down payment of it came from the very modest home that he had had for years in the Bronx. It is a sad commentary on our financial condition today, but due to inflation the house in the Bronx when he eventually sold it was much more valuable in dollars, I don't know about purchasing power, but in dollars than it was at the time that he had originally bought it. So that that enabled him to move up the scale and take his wife and two young daughters from the Bronx and up to Westerchester County.

I am certain and I am not pandering to the

Court that the imposition of sentence on your fellow man is a duty that your Honor takes very seriously and very possibly finds it to be very unpleasant. I am equally certain that your Honor has given very great consideration and thought in respect to a proper sentence for George Denti.

I am not going to make any suggestions to the Court. We have submitted our thoughts in our memorandum. I don't know whether custodial -- a custodial sentence will improve George Denti in the future. I don't know whether it wouldchange the man in any way, shape or form. I don't know that the Court knows that either.

I do know that there is a theory of law that a sentence may be a deterrent to others, a custodial sentence, who might be inclined to commit a similar crime.

I have been at the bar for 45 years and 44 years 9 months of it have been devoted to the practice of criminal aw boty in the State Courts and in the Federal Courts.

I have met all types of people charged with violation of the law and I have never in my lifetime met anyone whom I believe would be deterred by the fact that somebody else had received a custodial or a sentence of imprisonment. Even where you have classes of workers, such as postal workers or bank tellers or the like, the fact that the man

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or woman who stood next to him in the bank or in the post office had just been sentenced to six months or nine months or a year or years has not in my humble opinion kept the man who was about to or had been violating the law kept him from doing any further violation.

Possibly that is because of the fact that the ego that exists in all of us is such that the individual who is of the same class or who might commit the same type of crime believes that he is smarter than the person who has failed and that he will be able to accomplish it without detention.

I understand and I know very well, I have seen it through the years and your Honor has also, that invariably tax violation charges are brought so that if they culminate in a conviction, either conviction or the verdict of the jury or the sentence will come into being right around the first two weeks of April and I think that has been true here and that this trial was set at a date so that if ther- were, as the government hoped there would be and as it developed there was, a guilty verdict, the normal course of events of the sentence would result in the sentence being imposed at this tax paying time.

THE COURT: That is the only thing I have heard this morning that is utterly without foundation. I set the date of this trial. Nothing was more absent from

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my mind than the relationship between the date of a verdict and the possible date of a sentence and the time for tax returns or Easter or Thanksgiving or Passover, I don't know about your statistics, Mr. Rosenthal. I think they are also incorrect.

I have been here eight years and I have received verdicts and guilty pleas in tax cases spread through the year.

MR. ROSENTHAL: All right. I will withdraw the statement.

THE COURT: Actually, if the government had that kind of control and could exercise it, which it cannot, I would think it would not be very stupid to do so and that if deterrents can function around tax return time is the appropriate point at which to try to effect it, but the government does not have that power in this court, did not have that power in this case, you sat with me or, if you did not, I know Mr. Brill did, I cannot remember the chronology of your arrival on the scene, we met together in pretrial conferences, we discussed together the trial date, under the rules for speedy trials in this court and nothing else played any part except my calendar and the collaborative kind of discussion that takes place in every case, civil or criminal, in setting trial dates under

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our individual calendars.

MR.ROSENTHAL: That was before I came into the case, your Honor, and I will withdraw the statement, but what I had said had been some of my experiences in the past.

THE COURT: Do you disagree with anything I said, Mr. Silverman, I see you standing?

MR. SILVERMAN: No, your Honor. If the Court recalls, the government moved for a trial in early fall and Mr. Brill's trial schedule was very complicated at that time and that is why it was put on in February. The government wanted to try the case in September or October of 1973.

THE COURT: That is very possible, I don't remember it, but all I know is I have never been a participant in any case where the juxtaposition of verdict and sentence with some other event played any part in the fixing of a trial date.

MR. ROSENTHAL: I never thought that the Court had.

THE COURT: But it is my job. Mr. Silverman does not have the power to set trial dates in my court so that if there were any purpose to achieve the kind of coincidence you suggest, it would have to be my purpose or

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somebody would have to put one past me, which happens from time to time, but I don't think in the setting of trial dates.

MR.ROSENTHAL: I said I would withdraw those remarks, but we are faced with the fact that this sentence is immediately before the tax filing period and I am certain that the government hopes and believes and I don't question that their belief is not an honest belief that the imposition of a custodial sentence in respect to George Denti will act as a deterrent in respect to persons who are just about to put his or her signature to his tax return and who is just about to mail it to the Internal Revenue Service.

I have stated to the Court that I do not think that that should enter into your Honor's appraisal of what should be imposed upon the defendant George Denti.

There is little that I can add. Your Honor heard the case. Your Honor saw the defendant. Your Honor heard his testimony or in part and probably read or had the advantage and ability to read, if you so desired, his lengthy interrogation in the Internal Revenue Service prior to the trial and prior to the indictment and all I can say is that I believe, my belief may or may not carry some weight, but I do honestly believe that any mercy,

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any consideration at all that would be shown by your Honor to George Denti would not be misplaced.

THE COURT: All right, thank you, Mr. Rosenthal.

The defendants have a right to speak for themselves and I will hear either or both of you gentlemen.

Mr. Paterno?

MR. PATERNO: I really have nothing to add to what Mr. Brill said, your Honor.

THE COURT: Mr. Denti?

MR.DENTI: I think Mr. Rosenthal has stated all.

THE COURT: Let me just say that cases of this kind of so-called white collar crime, if that expression is permissible, present a pattern of familiar but nevertheless difficult factors for sentencing. Itdoes not make it trivial to say that I have heard over and over again what I hear this morning. That defendants like these have been punished enough by the suffering of themselves, their families, the diminution of their standing in the community and so on. I say I hear it over and over again which does not mean it is unreal. It is a fact. But it is a fact that has a limited significance because the other side of that coin is that the things that prod and pressure less fortunate people to commit crimes are not present with the more reputable members of the community. To be very

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candid about it, the members of the community who are like other professionals including judges present special problems.

It is clear with men like Mr. Paterno and Mr. Denti that rehabilitation is an irrelevant concept and I agree with Mr- Brill on that. Prison would do them no good and do the community no good so far as anybody can predict in terms of making them better people, more law abiding and so on.

And as counsel tick off the concerns with respect to defendants like Mr. Paterno and Mr. Denti, when you finally reach the point of determining that even the possibility of deterring other people is non-existent, then if one went along with this it would have to be concluded that the statutes, as Congress wrote them, are only partially operative because the statutes should say you can get up to five years in prison for this crime unless you are an otherwise reputable businessman in which event you should not be imprisoned at all because it does no good. It is just cruel and needless punishment.

Well, the point at which I do not agree with counsel and I guess I am not even permitted to agree with counsel is on the question of general deterrence. It is true we have no scientific knowledge on this subject, but we have

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to accept the rough impressions of the general run of people and our own introspective judgments and most of us, including me, are still of the view that the hope of deterring other people is one of the few acceptable justifications for sending anybody to prison.

I am reminded of the coincidence of this sentence today with the time for filing tax returns and I think, as I have expressed this at least once before, that one of the means by which we should seek general deterrence is by publicizing sentences. I mean to embody in a memorandum the reasons for the judgments to be passed in this case and to file them in the office of the clerk and make them available for publication if anybody is interested.

I am going to impose prison sentences in this case and a major factor in the judgment leading to that conclusion is the belief that we must try to serve, especially in crimes of greed and avarice, the objective of general deterrence.

Now, I have not failed, as I said earlier, to take into account all the things about these two gentlemen and I don't discount any of the positive things about their own lives. Their families, Mr. Denti's health, the standing they have enjoyed in the community, the impact of all this on their families and their friends are all

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moving concerns and I have taken them into account.

I also tried to imagine mitigating circumstances accounting for these crimes themselves. I have to say that that effort has been in vain. I have not been able to figure out any softening factor or influence to explain a course of what the jury was persuaded and, frankly, I was persuaded was flagrant and blatant and unvarnished fraud on the government of the most intentional and particularized and specific kind. I don't think there is anything before me that explains that. I must say that the explanation that I believe the defendants gave to their lawyers to present to the jury and to this court, if anything, was a negative influence. The explanation of these fictitious truckers in terms of adding up cubic yards of dirt was not a helpful thing to these defendants, though I take it if they gave it to their lawyers their lawyers were required to present it. It was something closely approaching an insult to the Court and the jury which obviously both of us, all of us, were compelled to think about how five truckers paid large sums of money over periods of years could utterly disappear from the face of the earth if they had ever existed and in lieu of any attempt to talk about that and I realize the defendants have no burden of proof, but there comes a point where a record screams for some account,

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instead of giving even the remotest hint of a suggestion that this was not simply an egregious course of fraud, we were treated to the expertise that measured dirt and looked at pictures to see how many imaginary trucks would have had to take how much dirt from where to where.

Be that as it may, that is all the defendants offered at any point in this record and I cannot, as I say, regard any of that as being remotely mitigating. If I had to consider it at all, I think it would tend in the other direction, but leaving all that aside, for the reasons I have tried to sketch here and will complete writing down in a while and file in writing in the office of the clerk, I am imposing prison sentences and fines as follows:

In the case of Michael Paterno, on each of Counts 1 to 8, a sentence of nine months in prison. The sentences to run concurrently.

In addition, on each of those counts a fine of $2,500. Those fines to be cumulated for a total fine of $20,000.

For George Denti, the Court will impose a similar prison sentence on each of the counts on which he was charged and convicted, Counts 2 through 5 and Count 9, nine months in prison, the sentences to run concurrently.

In addition, on each of those five counts a fine of

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$2,000 to be cumulated making a total fine of $10,000.

For the defendant corporation, Paterno & Sons, Inc., on each of Counts 1 through 5, a fine of $5,000 to be cumulated for a total fine of $25,000.

Those are the judgments, gentlemen.

THE CLERK: Is the fine to be paid by any certain time, your Honor, or committed?

THE COURT: Let us see and I will tell you in a minute.

Mr. Brill.

MR. BRILL: Your Honor, I have talked with the prosecutor with respect to the matter of bail pending appeal. I think I understood him to say that if your Honor granted or was willing to grant a continuation of the bail conditions, he had no objection.

THE COURT: Mr. Silverman.

MR. SILVERMAN: That is accurate, your Honor. My statement was that the government would not oppose a request for bail pending appeal.

THE COURT: All right. In that light and in all the circumstances thebail heretofore set may be continued pending an expeditious appeal. I assume the notice will be filed in the next day or so and that the appeal will be prosecuted without delay.

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I think that concludes our business.

MR. ROSENTHAL: I make the same application.

THE COURT: Yes, in both cases and therefore I would think in the case of all three defendants the judgment is stayed pending the appeal. If there should be an affirmance this stay should have allowed the accomplishment of many things the defendants need to do with their businesses and so on in the interim.

MR. BRILL: Thank you, sir.

MR. ROSENTHAL: Thank you, your Honor.

THE COURT: All right, gentlemen.

(Time noted: 10:50 a.m.)

JUDGMENT.

(Michael Paterno)

UNITED STATES DISTRICT COURT,

FOR THE

SOUTHERN DISTRICT OF NEW YORK.

- -X

UNITED STATES OF AMERICA,

v.

MICHAEL PATERNO.

No. 73 CR 419

- -X

On this 10th day of April , 1974 came the attorney for the government and the defendant appeared in person and by Joseph E. Brill, Esq.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly combining, confederating and agreeing with others to commit offenses against the United States, to wit, to violate Title 26, U.S. Code, Section 7201. It was part of said conspiracy that the said defendant wifully attempted to evade and defeat a large part of

JUDGMENT

(Michael Paterno)

income taxes due and owing to the United States of America. (Title 18, U.S. Code, Section 371). Unlawfully, wilfully and knowingly making and causing to be made and subscribing the income tax returns of a corporation which returns contained and were verified by a written declaration that it was made under the penalties of perjury, and which he did not believe to be true and correct as to certain material matters. (Title 26, U.S. Code, Section 7206(1).).

Unlawfully, wilfully and knowingly attempting to evade and defeat and caused to be evaded and defeated a large portion of a corporate income tax due and owing the United States of America by perparing and causing to be prepared, and filing and causing to be filed with the Internal Revenue Service a false and fraudulent corporate income tax return. (Title 26, U.S. Code, Section 7201.), as charged in counts 1 thru 8 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

JUDGMENT

(Michael Paterno)

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of NINE (9) MONTHS, on each of counts 1 thru 8 to run concurrently with each other. Defendant is fined $2,500 on each of counts 1 thru 8, total fine is $20,000. Defendant is released on $10,000 personal recognizance bond pending appeal. Judgment stayed pending appeal.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By G. Harbison, Deputy Clerk.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

MARVIN E. FRANKEL,
United States District Judge.

RAYMOND F. BURGHARDT,
Clerk.

JUDGMENT.

(Paterno & Sons, Inc.)

UNITED STATES DISTRICT COURT,

FOR THE

SOUTHERN DISTRICT OF NEW YORK.

- -X

UNITED STATES OF AMERICA,

v.

PATERNO & SONS, INC.

No. 73 Cr 419.

- -X

On this 10th day of April, 1974, came the attorney for the government and the defendant appeared by Joseph E. Brill, Esq.

IT IS ADJUDGED that the defendant upon its plea of not guilty thru Michael Paterno, President and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly combining, confederating and agreeing with others to commit offenses against the United States, to wit, to violate Title 26, U.S. Code, Section 7201. It was part of said conspiracy that the said defendant wilfully attempted to evade and defeat a large part of income taxes due and owing

JUDGMENT

(Paterno & Sons, Inc.)

to the United States of America. (Title 18, U.S. Code, Section 371). Unlawfully, wilfully and knowingly attempting to evade and defeat and caused to be evaded and defeated a large portion of a corporate income tax due and owing the United States of America by preparing and causing to be prepared, and filing and causing to be filed with the Internal Revenue Service a false and fraudulent corporate income tax return. (Title 26, U.S. Code, Sec. 7201), as charged in counts 1 thru 5, and the court having asked the defendant whether it has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendantis fined $5,000 on each of counts 1 thru 5, total fine $25,000. Judgment stayed pending appeal.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk,

By G. Harbison, Deputy Clerk.

MARVIN E. FRANKEL,
United States District Judge.

RAYMOND F. BURGHARDT,
Clerk.

JUDGMENT.

(George Denti)

UNITED STATES DISTRICT COURT,

FOR THE

SOUTHERN DISTRICT OF NEW YORK.

- -X

UNITED STATES OF AMERICA,

v.

GEORGE DENTI.

No. 73 CR 419.

- -X

On this 10th day of April, 1974 came the attorney for the government and the defendant appeared in person and by Gilbert Rosenthal, Esq.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly combining, confederating and agreeing with others to commit offenses against the United States, to wit, to violate Title 26, U.S. Code, Section 7201. It was part of said conspiracy that the said defendant wilfully attempted to evade and defeat a large part of

income taxes due and owing to the United States of America. (title 18, U.S. Code, Section 371). Unlawfully, wilfully and knowingly attempting to evade and defeat and caused to be evaded and defeated a large portion of a corporate income tax due and owing the United States of America by preparing and causing to be prepared, and filing and causing to be filed with the Internal Revenue Service a false and fraudulent Corporate income tax return. (title 26, U.S. Code, Section 7201). Unlawfully, wilfully and knowingly making and causing to be made and subscribing the income tax returns of a corporation which returns contained and were verified by a written declaration that it was made under the penalties of perjury, and which he did not believe to be true and correct as to certain material matters. (Title 26, U.S. Code, Section 7206(1).), as charged in counts 1 thru 5 and 9, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

1983a

JUDGMENT

(George Denti)

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of NINE (9) MONTHS, on each of counts 1 thru 5 and 9 to run concurrently with each other. Defendant is fined $2,000 on each of counts 1 thru 5, total fine is $10,000. Defendant is released on $10,000 personal recognizance bond pending appeal. Judgment stayed pending appeal.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By G. Harbison, Deputy Clerk.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

MARVIN E. FRANKEL,
United States District Judge.

RAYMOND F. BURGHARDT,
Clerk.

NOTICE OF APPEAL BY MICHAEL PATERNO.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- -X

UNITED STATES OF AMERICA,

v.

MICHAEL PATERNO, GEORGE DENTI and PATERNO AND SONS, INC.,

Defendants.

No. 73 Cr. 419

- -X

The Appellant MICHAEL PATERNO hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment of conviction imposed and entered on April 10, 1974 after a jury verdict of guilty under the indictment charging violations of Title 18 United States Code Section 371, Title 26 United States Code Section 7201 and Title 26 United States Code Section 7206(1), and from the order of the Hon. Marvin E. Frankel, United States District Judge, denying the appellant's motion for a judgment of acquittal and for a new trial pursuant to Rules

NOTICE OF APPEAL BY MICHAEL PATERNO

29 and 33 of the Federal Rules of Criminal Procedure entered on April 10, 1974, and from each and every part of said judgment and order.

Dated: April 10, 1974.

MICHAEL PATERNO Pro Se
Dodge Road
Pawling, New York

TO: PAUL J. CURRAN, ESQ.,
United States Attorney,
United States Court House,
Foley Square,
New York, N.Y. 10007

NOTICE OF APPEAL BY PATERNO AND SONS, INC.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- -X

UNITED STATES OF AMERICA,

v.

MICHAEL PATERNO, GEORGE DENTI and PATERNO AND SONS, INC.,

Defendants.

No. 73 Cr. 419

- -X

The Appellant PATERNO AND SONS, INC. hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment of conviction imposed and entered on April 10, 1974 after a jury verdict of guilty under the indictment charging violations of Title 18 United States Code Section 371 and Title 26 United States Code Section 7201, and from the order of the Hon. Marvin E. Frankel, United States District Judge, denying the appellant's motion for a judgment of acquittal and for a new trial pursuant to Rules 29

NOTICE OF APPEAL BY PATERNO AND SONS, INC.

and 33 of the Federal Rules of Criminal Procedure entered on April 10, 1974, and from each and every part of said judgment and order.

Dated: April 10, 1974.

PATERNO AND SONS, INC.,

By: MICHAEL PATERNO, President
Pro Se
R.D. 3
Brewster, N.Y. 10509

TO: PAUL J. CURRAN, ESQ.,
United States Attorney,
United States Court House,
Foley Square,
New York, N.Y. 10007

NOTICE OF APPEAL GEORGE DENTI.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- -X

UNITED STATES OF AMERICA,

v.

GEORGE DENTI, et al,

Defendants.

No. 73 Cr. 419

- -X

SIRS:

NOTICE IS HEREBY GIVEN that GEORGE DENTI, the above named defendant, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this proceeding on the 10th day of April, 1974.

Dated: New York, New York,
April 10, 1974

Yours, etc.,

GEORGE DENTI, Defendant pro-se
Office & P.O. Address
Francis Drive
Somers, Westchester County,
New York. 10536
Tel: (914) 232-8735.

NOTICE OF APPEAL GEORGE DENTI

TO: PAUL J. CURRAN, ESQ.,
United States Attorney for the Southern
District of New York.

The defendant, George Denti, resides at:
Frances Drive
Somers, Westchester County,
New York 10536
Tel: (914) 232-8735